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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 499

GEORGE E. BALDWIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, George E. Baldwin, defendant-appellant in the Court below, petitions this Court to issue its writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The decision of the United States Circuit Court of Appeals for the Seventh Circuit in the case of *United States of America, Plaintiff-Appellee* v. *George E. Baldwin Defendant-Appellant* No. 13354, was filed on July 16, 1962. Rehearing was denied on September 12, 1962, which affirmed the judgment and orders of the United States District Court for the Southern District of Illinois, Southern Division, entered April 6, 1961 on Counts 1 and 2 of the indictment finding said George E. Baldwin guilty and sentencing him to three years imprisonment on Count 1 and placing him on probation for five (5) years on Count 2 and ordering him to pay a $5000.00 fine and Court costs in the amount of $732.47. See copy of the said opinion of the United States Circuit Court of Appeals hereto attached as Appendix A. Said opinion has not as yet been reported in the Federal Reporter.

JURISDICTION

This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit on September 12, 1962. (Appendix B) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. The decision of the United States Circuit Court of Appeals in this case is contrary to its former decisions on the questions involved here.

2. George E. Baldwin, Defendant-Appellant, received no income for either the year 1953 or the year 1954 beyond that reported by him for those years.

3. Said George E. Baldwin employed Roger V. Pierson as his attorney to represent him in the preparation of his 1953 and 1954 Income Tax Reports.

4. Said George E. Baldwin fully disclosed to his said attorney, Roger V. Pierson, all of the facts with reference to his income for the years 1953 and 1954.

5. Said George E. Baldwin relied upon and acted upon the advice of his said attorney, Roger V. Pierson.

6. The Government failed to prove beyond a reasonable doubt by clear and convincing evidence that George E. Baldwin received income for either 1953 or 1954 which he deliberately and wilfully and with specific intent failed to include in his returns for either of said years.

7. The Government failed to prove said wilfullness and specific intent on the part of George E. Baldwin *by independent and additional evidence beyond the mere alleged understatement of his income.*

8. The Government had no right to prove income to George E. Baldwin by introducing evidence of subscriptions received by him from various persons to the partnerships known as Arizona Material Service Company and Marion Development Company, in which partnerships said George E. Baldwin was a partner.

STATEMENT OF THE CASE.

During the years 1953 and 1954, Defendant-appellant, George E. Baldwin, was engaged principally in the business of buying and selling interests in oil and gas leases and in drilling and equipping oil wells thereon.

On January 14, 1954, George E. Baldwin filed an income tax report for 1953 on behalf of himself and his wife, Lucille, with the Director of Internal Revenue, at Chicago, Illinois reporting a joint income for 1953 of $3,473.23 and paid a tax of $162.00.

On January 31, 1955, George E. Baldwin filed his individual income tax report for 1954 at the same place reporting his own income at $1,072.00 with no tax (App. 1-2).

Roger V. Pierson, attorney, represented Baldwin in the preparation of both reports, devoting two to three days each year with reference to the preparation of the same (App. 14).

In August, 1957, Arthur A. Ronat representing himself to be an expert C.P.A. acting for the United States Government, in income tax matters from the Springfield, Illinois office, called upon Defendant-appellant, George E. Baldwin, Petitioner here, and requested Baldwin's books and records for the years 1953 and 1954 for examination. Both Baldwin and his attorney, Roger V. Pierson, cheerfully agreed to, and did deliver said books and records to Mr. Ronat (App. 309, 310, 350), who testified as a witness for the Government that he had the exclusive possession of same from August, 1957 until April, 1959 (App. 376). Many conferences were held between Mr. Pierson, Mr. Baldwin and Mr. Ronat (App. 350-386). One conference also was held between Mr. Ronat, Mr. Kinne, attorney for Baldwin

at the trial of this case, and Ira Burman, Government Regional Counsel in Chicago (App. 377, 382, 383). Mr. Ronat stated that the records implied that Baldwin reported on a cash receipts and disbursements basis (App. 310). At this point Defendant surely was not even attempting to conceal anything from the government (App. 218-376)

On January 8, 1960 George E. Baldwin was indicted in the United States District Court for the Southern District of Illinois, Southern Division at Springfield, Illinois, for failing to report income in the sums of $28,748.71 for 1953 under Count 1 and $42,230.72 for 1954 under Count 2, and for attempting to evade income taxes amounting to $8,239.38 for 1953 and $19,278.20 for 1954 (App. 1-2).

At the opening of the trial Defendant-appellant pleaded "not guilty" to both Counts and made a motion for a bill of particulars, which motion was denied.

The Government introduced in evidence Defendant Baldwin's income tax reports for the years 1953 and 1954 as its Exhibits Nos. 1 and 2, as well as his bank statements, to prove additional income to Baldwin for the years 1953 and 1954 (App. 311, 312; Vol. IV, App. 12-14). Those bank statements showed, at the end of 1953, a total balance of $435.48, and, at the end of 1954, a total balance of $271.32 (Gov't. Exhibits Nos. 3-11, Vol. IV, pp. 12-14). The Government made no effort to explain the deposits *or deductions* shown on said bank statements, or the inter-deposits made from one bank to the other totaling $22,000.00 for 1953 and $9,000.00 for 1954 (App. 397).

Here again it is entirely clear that Defendant was not attempting to conceal anything from the government (App. 7-18, 376).

Under the supervision and direction of Mr. Arthur A. Ronat, the Government agent, who was present during the entire trial, the Government called 57 witnesses, prac-

tically all of whom testified to having paid George Baldwin various sums for the purchase of their respective interests in oil and gas leases from him. Mr. Ronat, the Government's agent and its main witness, contended that those respective amounts of payments for oil interests constituted income without any proof as to the value of such interests so purchased from Baldwin by said investors.

The Government called as its first witness, Roger V. Pierson, who acted as attorney for Defendant-Appellant, George E. Baldwin, in the preparation of his 1953 and 1954 income tax reports, as well as at the conferences with Government Agent, Arthur A. Ronat (App. 7-18). Attorney Pierson testified, on behalf of the Government, that he represented George E. Baldwin in the preparation of his income tax reports for 1953 and 1954 and that he had delivered all of his books and records to Mr. Ronat, agent for the Government, who had possession of same for almost two years. Mr. Pierson also testified that, during the preparation of said income tax reports, he discussed with Mr. Baldwin whether or not there might exist income to Baldwin during those particular years which was not deposited in the banks, that Baldwin relied entirely on his services and advice, and that Baldwin's income tax reports for the two years in question were correct in his opinion (App. 7-18).

Attorney Pierson was later called as a witness by Baldwin (App. 949). Mr. Pierson testified that he knew all of Baldwin's business arrangements from 1953 on, that he had a particular personal knowledge of his personal affairs, that he did not think there was any question but that he had all the information necessary to prepare Baldwin's income tax reports for 1953 and 1954, and that neither Mr. Baldwin nor Mrs. Baldwin ever withheld anything from him. "I would tell them what my opinion was on its

inclusion in or exclusion from the income tax reports, and there never was any dispute. I think they followed my advice without question. I was personally familiar with his enterprises. Mr. Ronat would have to admit that I never withheld a scrap of paper, gave him complete co-operation at all times."

On direct examination of Defendant Baldwin he was asked the direct question as to whether he had any intention of concealing anything from the Government, Mr. Pierson, his attorney, or anyone else (App. 708-709). He answered, "Well, I never have, why should I? I live in the U.S. I am an American citizen and I think everybody should pay taxes and I turn in everything I could find and everything we had a record of."

The government offered no evidence whatsoever other than mere items of alleged additional income in answer to the above testimony of Defendant Baldwin.

At this point, therefore, and according to the testimony of the Government's own witness, Pierson, as well as the Government's introduction of Baldwin's bank statements, the trial court should have dismissed this case.

Motions were made by Defendant Baldwin for a dismissal of the case as to him at the close of the Government's case (App. Vol. IV p. 4) as well as at the close of the entire case (App. Vol. IV, p. 6)

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS CONTRARY TO MANY OF THE DECISIONS OF THE VARIOUS CIRCUITS IN OTHER CASES INVOLVING SIMILAR FACTS.

In the case of *Rainwater* v. *United States*, 356 U.S. 590, 2 L. ed. 2d, 996, 998, this Court said on page 592:

> "Because of a conflict in the Circuits we granted certiorari, 355 U.S. 811, 2 L. ed. 29, 78 S. Ct., solely to consider whether false claims against Commodity are covered by the False Claims Act."

In the case of *Rutkin* v. *U.S.*, 343 U.S. 130, 96 L. ed. 833, 72 S. Ct. 571, this Court said on page 133:

> "Petitioner was found guilty by a jury in the United States District Court for the District of New Jersey, fined $10,000.00 and sentenced to four years in prison. The Court of Appeals affirmed, one judge dissenting. 189 F. 2d 431. We granted certiorari, 342 U.S. 808 *ante* 611, 72 S. 50, so as to pass upon the alleged conflict between that decision and the decision in *Commissioner* v. *Wilcox*, 327 U.S. 404, 90 L. ed. 752, 66 S. Ct. 546, 166 A.L.R. 884."

In the case of *National Relations Board* v. *Duval Jewelry Co.*, 357 U.S. 1, 2 L. Ed. 1097, 1100, this Court said on page 4:

> "The case is here on certiorari, 355 U.S. 809, 2 L. ed. 2d. 28, which we granted because of a conflict among the Circuits. See e.g. *NLRB* v. *Lewis* (CA 9 Cal.) 249 F. 2d 832, 836, 837; *NLRB* v. *Gunaca* (DC Wis. 135 Supp. 790, affd. (CA 7) 230 F. 2d 542."

In the case of *Local 1976 U.B.C.& J. v. NLRB*, 357 U.S. 93, 2 L. ed. 1186, this Court said on page 1193:

> "We granted certiorari in all three cases because of conflicts among the Circuits as to the meaning of Sec. 8 (b) (4) (A) and because of the importance of the problem in the administration of the National Labor Relations Act, and ordered them consolidated for argument, 355 U.S. 808, 2 L. ed. 2d 27, 78 S. Ct. 42, 56."

It is therefore clear from the above decisions of this Court and the facts herein stated that this Court should issue a writ of certiorari to correct the errors of the trial court as well as those of the United States Court of Appeals for the Seventh Circuit in this case.

In its opinion the United States Circuit Court of Appeals did not mention any of the many decisions of that Court, as well as this Court, cited there and here by Defendant-appellant, George E. Baldwin, petitioner here. In fact the Court of Appeals neither cited nor discussed any court decisions whatsoever.

II.

IT IS NOW WELL SETTLED THAT WHERE A TAXPAYER, IN GOOD FAITH, ACTS UPON THE ADVICE OF AN ACCOUNTANT OR AN ATTORNEY AFTER FULL DISCLOSURE OF THE FACTS TO SUCH ACCOUNTANT OR ATTORNEY, SUCH TAXPAYER WILL NOT BE PENALIZED FOR SUCH ERROR.

In the case of *Burton Schwartz and Corp.* v. *United States*, 198 F. 2d 558, 560 the Court said on p. 560:

> "It is now well settled that the advice of a competent accountant constitutes 'reasonable cause' for failure to file a tax return, and that a taxpayer who in good faith acts upon such advice, after full disclosure

to the accountant, is not guilty of wilful neglect. Such a taxpayer will not be penalized for the accountant's error. It has been so held by the Tax Court itself. Citing many cases."

In the case of *Orient Investment & Finance Co.* v. *Commissioner*, 166 F. 2d 601, the Court found that the taxpayer had turned over to accountants all the records of the companies and in this case nothing was withheld. The accountants physically had the books and saw the entries. The taxpayers relied upon their action in preparing the returns correctly. Under such circumstances the court said that to hold the taxpayer liable for penalties would not only be "contrary to natural justice, but also to many previous decisions of the Tax Court." That court recognized the principle that "it is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Spies* v. *U. S.*, 317 U.S. 492, 496, 63 S. Ct. 364, 87 L. Ed. 418.

In the case of *In Re Fisk's Estate*, 203 F. 2d 358 on Page 359 the Court said:

> "We think the addition of the penalty constituted errors as a matter of law. * * * What elements must be presented to constitute reasonable cause is a matter of law. (Citing cases) Reasonable cause means nothing more than the exercise of ordinary business care and prudence. (Citing cases) Various courts have held as a matter of law that reliance upon an attorney or an accountant for making out and filing of tax returns constitutes reasonable care."

The Court further said on page 359:

> "As pointed out by the Second Circuit in *Haywood Lumber & Mining Co.*, 178 F. 2d 771, 'To impute to the taxpayer the mistakes of his consultant would be to penalize him for consulting an expert.'"

See also the cases of *McIntyre* v. *C.I.R.*, 272 F.2d 188, 189; *Mayflower Indemnity Co.* v. *Commissioner*, 239 F. 2d 624, 627; *Bryan* v. *C.I.R.*, 281 F.2d 238, 244; *Haywood* v. *Mining and Lumber Co.*, 178 F.2d 769, 771.

In the case of *Porter-Cable Machine Co.* v. *Knives & Saws Co.*, 204 F. 2d 21, the Court said on page 21:

> "In *Burton Swartz Land Corp.* v. *Commissioner*, 5 Cir., 198 F. 2d 558, a corporate taxpayer did not file returns on the advice of a competent tax accountant. In finding that in such a case the imposition of penalties was not proper, the court said, 198 F. 2d at page 560:
>
> > 'It is now well settled that the advice of a competent accountant constitutes "reasonable cause" for failure to file a tax return, and that a taxpayer who in good faith acts upon such advice, after full disclosure to the accountant, is not guilty of wilful neglect. Such a taxpayer will not be penalized for the accountant's error. (Citing cases.)' "

In the case of *Ingram* v. *U. S.*, 360 U.S. 672, 3 L. ed. 2d 1503, 79 S. Ct. 1314, this Court said on page 1509:

> "Two essential elements of the crime, (evasion of payment of taxes) *first*, knowledge that the taxes are due, and, *second*, a 'wilful and positive attempt to evade tax in any manner or to defeat it by any means.' *Spies* v. *U. S.*, 317 U.S. 492, 499, 87 L. Ed. 418, 423, 63 S. Ct. 364."

In Mr. Justice Harlan's separate opinion he says on page 1510:

> "What was said in *Direct Sales Co.* v. *U. S.* on behalf of a unanimous Court is of particular relevance here: 'Without the knowledge, the intent cannot exist . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal'."

In view of the above decisions of the United States Circuit Court of Appeals for the various circuits as well as those of this Court, the Court of Appeals should have reversed the judgment of the trial court, based upon the above-mentioned bank statements, the testimony of *Roger V. Pierson* (Baldwin's attorney), the *Government's own first witness*, as well as on the uncontroverted testimony of Defendant-Appellant Baldwin to the effect that he never had any intention of concealing anything from the Government, his attorney, Pierson, or anyone else (Page 7 this petition).

III.

IN A PROSECUTION FOR INCOME TAX EVASION THE GOVERNMENT MUST SHOW THAT THE TAXPAYER HAD INCOME WHICH HE DELIBERATELY FAILED TO INCLUDE IN HIS RETURN.

There can be no possibility whatsoever of the Government proving by the evidence offered by it that Defendant had income which he deliberately failed to include in his return. See the testimony of the Government's own witness, attorney Pierson, (Pages 6 and 7 of this petition).

In the case of *Gendelman* v. *United States*, 191 F. 2d 993 the Court said on page 996:

> "In prosecution for evasion of income taxes, to present question for jury, Government must show that the taxpayer had income which he deliberately failed to include in his return. 26 U.S.C.A. 145 (b)."

Defendant-Appellant was acting upon the definite advice of his own attorney, Roger V. Pierson, a witness for the Government.

IV.

THE BURDEN OF PROVING DEFENDANT GUILTY OF EVERY ELEMENT OF WILFULLY EVADING A GOVERNMENT INCOME TAX BEYOND A REASONABLE DOUBT RESTS UPON THE GOVERNMENT FROM THE BEGINNING TO THE END OF THE TRIAL.

In the case of *United States of America* v. *George E. Phillips*, 217 F. 2d 435 on p. 442 said:

> "It is now settled that 'wilfully', as used in this offense, means more than intentionally or voluntarily, and includes an evil motive or bad purpose, so that evidence of an actual bona fide misconception of the law, such as would negative knowledge of the existence of the obligation, would, if believed by the jury, justify a verdict for the defendant. (Citing many cases.)"

In the case of *United States of America* v. *George E. Phillips*, 217 F. 2d 435 (p. 441), that Court, on page 441, quoted from the decision in *Tatum* v. *United States*, 88 U.S. App. D.C. 386, 190 F. 2d 612, page 615, where that court quoted from *Davis* v. *United States*, 160 U.S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499:

> "'Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. * * * the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt.'"

In the case of *Hooper* v. *United States*, 216 F. 2d 684, 689, that Court defined a reasonable doubt as a doubt based upon reason, a substantial doubt as distinguished from a flimsy one, a significant doubt, an important doubt of the

kind that the members of a jury might be willing to act upon in the more important affairs of their own lives.

That Court at p. 688 says:

> "The word 'wilfully' means purposefully, means knowingly, means intentionally; it does not mean by inadvertence or mistake, through ignorance, neglect."

In the case of *United States* v. *Fenwick*, 177 F. 2d 488 that Court said on page 490:

> "In such a situation we must keep in mind that the conviction can not stand unless there is proof of the corpus delicti, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed." (Citing many cases) "Evidence of *mere probability* of guilt is not sufficient."

In the case of *Graves* v. *United States*, 191 F. 2d 579 that Court said on page 582:

> "In prosecution for wilfully attempting to evade Federal Income Taxes for specified year by making and filing false and fraudulent returns for such year, circumstantial evidence was required to be so strong and convincing as to exclude any reasonable ground for believing defendant to be innocent."

In the case of *Holland* v. *United States*, 209 F. 2d 516 on page 522 that Court described the words "reasonable doubt" to mean a doubt based upon reason and common sense in the exercise of the jury's intelligence; that it meant a "substantial doubt, not a trivial doubt; a significant doubt, not a flimsy one; a real doubt; not an imaginary one." See cases cited on pages 522 and 523.

Arthur A. Ronat, the Government's agent, has not even mentioned in the trial of this case the word "wilfull" or the word "fraud" with reference to Defendant Baldwin's conduct.

V.

A FINAL ELEMENT NECESSARY FOR CONVICTION IS WILFULNESS, WHICH INVOLVES A SPECIFIC INTENT AND WHICH MUST BE PROVED BY INDEPENDENT EVIDENCE AND WHICH CANNOT BE INFERRED BY THE MERE UNDERSTATEMENT OF INCOME.

In the case of *United States of America* v. *Samuel Andrew Lindstrom, Jr.* and *United States of America* v. *Samuel Andrew Lindstrom, Sr.*, 222 F. 2d 761, defendants had 5 bank accounts. The defendants were a father and a son.

That Court said on p. 763:

> "The case as to Lindstrom, Senior, comes squarely within the rule, as recently restated by this Court in *Holland* v. *United States*, 1954, 348 U.S. 121, 139, 75 S. Ct. 127, 137 as follows:
>
> > 'A final element necessary for conviction is wilfullness. The petitioners contend that wilfullness involves a specific intent which must be proved by independent evidence and which cannot be inferred by the mere understatement of income.' This is a fair statement of the rule."

In the case of *Haigler* v. *United States*, 172 F. 2d 986 that Court said on p. 987:

> "Wilfulness being an essential element of the offense charged, evidence showing or tending to show lack of it, is a defense, and is admissible for that purpose."

The Court, in the *Haigler* case, continues with the same language quoted in the *Miller* case cited above and cites the *Miller* case.

The judgment of the trial court was reversed in the Miller and Haigler cases, and also in the Hargrove, Buick Sedan, and Dearing cases cited above.

In the case of *Dearing* v. *United States*, 167 F. 2d 310, the Court said at the foot of page 312:

> "Subparagraph (7)(b) makes wilfulness a constituent element of the offense. When the word 'wilfulness' is used in a penal statute, more is required than the mere doing of the act prescribed. It generally means an act done with a bad purpose without justifiable excuse. *Screws* v. *United States*, 325 U.S. 91, 101, 65 S. Ct. 1031, . . .; *United States* v. *Illinois Central Railroad*, 303 U.S. 239, 58 S. Ct. 533, . . .; *United States* v. *Murdock*, 290 U.S. 389, 54 S. Ct. 223, . . .; *Spurr* v. *United States*, 174 U.S. 728, 19 S. Ct. 812; *Potter* v. *United States*, 155 U.S. 438, 15 S. Ct. 144; *Felton* v. *United States*, 96 U.S. 699; *One* 1941 *Buick Sedan* v. *United States*, 10 Cir., 158 F. 2d 445; *Hargrove* v. *United States*, 5 Cir., 67 F. 2d 820, . . . The filing of form 1227 without including the collected cash fares created a presumption of wilfulness, but evidence showing or tending to show lack of wilfulness is a defense to the charge and is admissible for that purpose. *Hicks* v. *United States*, 150 U.S. 442, 14 S. Ct. 144; *One* 1941 *Buick Sedan* v. *United States*, *supra*. The proffered testimony touching the question of wilfulness would have tended to generate a reasonable doubt of the appellant's guilt, and it was therefore error to exclude it."

1941 Buick Sedan v. *United States*, 10 Cir. 158 F. 2d 445; *Hargrove* v. *U. S. 5th Cir.*, 67 F. 2d 820, 90 A.L.R. 1276; Annotation 90 A.L.R. 1280. *We have said that where, as here, motive or bad purpose is an essential element of the offense charged, the accused may not only directly testify that he had no such motive or purpose*, but he may, within rational rights, "buttress such statement with testimony of relevant circumstances, including conversations had

with third persons or statements made by them, tending to support his statement * * *." *Miller* v. *United States*, 10 Cir., 120 F. 2d 968, 980. See also Underhill's Criminal Evidence, 4th Ed., Sec. 138. (Italics ours) Baldwin did so testify. (App. 708, 709)

In the case of *Lloyd I. Small, Sr.* v. *United States of America*, 255 F. 2d 604, that Court said on page 605:

> "The defendant moved for acquittal at close of the government's case and also at the end of the trial and the issue before us is whether the evidence, viewed in light most favorable to the government, was sufficient to support a verdict of guilty. Citing *Glasser* v. *United States*, 315 U.S. 60; 62 S. Ct. 457, 86 L. Ed. 680."

That Court further said on page 609:

> "Unlike a civil case burden is not upon defendant to prove the Commissioner was wrong in treating this expenditure as a capital improvement. Rather, the burden is upon the government to show that there was a tax due."

On page 606 that Court said:

> "The government has the burden of proving every element of the crime beyond a reasonable doubt. *Holland* v. *United States*, 1954, 348 U.S. 121, 138, 75 S. Ct. 127, 99 L. Ed. 150. One of the basic elements of the offense is an understatement of tax, see *Elwert* v. *United States*, 9 Cir., 1956, 231 F. 2d 928, and a prerequisite to the imposition of a tax is the establishment of taxable income. . . ."

The Government introduced no independent evidence whatsoever from which wilfullness or specific intent on the part of Defendant Baldwin to defraud the Government can be inferred. The Government sought only to prove an alleged understatement of income. The Government failed to prove even that understatement.

VI.

FRAUD IS NEVER PRESUMED BUT MUST BE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE.

In the case of *Shahadi* v. *Commissioner of Internal Revenue,* 266 F. 2d 495 the Court said on page 501:

> "Fraud is never presumed but must be established by clear and convincing evidence. *Valetti* v. *Commissioner,* 3 Cir., 260 F. 2d 185, 188; *Commissioner* v. *Rubinstein,* 3 Cir., 264 F. 2d 478. See Sec. 1112 of Internal Revenue Code of 1939."

VII.

A PARTNERSHIP AS SUCH SHALL NOT BE SUBJECT TO THE INCOME TAX IMPOSED BY CHAPTER 26, PARAGRAPH 701.

Internal Revenue Code, 26 Par. 701, Partners, not partnership, subject to tax provides as follows:

> "A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities."

In the case of *Wellington* v. *Commissioner of Internal Revenue,* 196 F. 2d 421, that Court said on page 423:

> "Whether for income tax purposes a partnership exists depends upon the particular facts in each case. The determinative question is whether the partners really intended to join together for the purpose of carrying on the partnership business, sharing its profits or losses or both. If a person contributes capital and valuable services to a partnership, he is entitled to be treated as a *bona fide* partner for income tax purposes, *Commissioner of Internal Revenue*

v. *Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670; *Lusthaus* v. *Commissioner of Internal Revenue*, 327 U.S. 293, 66 S.Ct. 539, 90 L.Ed. 679; *Greenberger* v. *Commissioner of Internal Revenue*, 7 Cir., 177 F. 2d 990; *Funai* v. *Commissioner of Internal Revenue*, 4 Cir., 181 F. 2d 890; *Stanchfield* v. *Commissioner of Internal Revenue*, 8 Cir., 191 F. 2d 826; and *Wenig* v. *Commissioner of Internal Revenue*, 85 U.S. App. D.C. 216, 177 F. 2d 62. And 'The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case (*Commissioner* v. *Tower*, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670), but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the * * * conduct of the enterprise.' *Commissioner of Internal Revenue* v. *Culbertson*, 337 U.S. 733, 742, 69 S.Ct. 1210, 1214, 93 L.Ed. 1659." . . .

See also the case of *Stoffield* v. *Commissioner*, 203 F. 2d 667, 669.

In the case of *U. S.* v. *Atkins*, 189 F. 2d 414, that Court said on p. 416:

> "We are of the opinion that the taxpayer remained a partner in the several partnerships in question, and should be taxed on his distributive share from such partnerships. The law is well settled that a partner remains taxable on his full share of income from a partnership of which he is a member even though he assigns a part of his interest to another unless such assignee actually becomes a partner in the original enterprise." Citing *Burnet* v. *Leininger*, 285 U.S. 136, 52 S.Ct. 345; *Morton* v. *Thomas*, 158 F. 2d 574.

In the case of *Rupple* v. *Kuhl*, 177 F. 2d 823 that Court (7th, Circuit) said on page 826:

> "As the District Court aptly stated (81 F. Supp. 318, 321), 'The statutes accord a joint venture the same tax treatment as a partnership'. That each venturer is entitled to recognition for tax purposes was established by *Tompkins* v. *Commissioner*, 4 Cir., 97 F. 2d 396. Decisions of the Tax Court are in accord with the decisions of the lower court to the effect that the income from a partnership interest which is owned by parties to a joint venture is taxable proportionally to the members of the joint venture. See *Hinckley* v. *Commissioner*, 6 B.T.A. 312; *Wing* v. *Commissioner*, 17 B.T.A. 1028; *Tuthill* v. *Commissioner*, 22 B.T.A. 887. • • • In this case to tax all the income from the partnership interest to the taxpayer would be to fail to accord to the joint venture between the taxpayer and his wife the tax recognition to which it is entitled under the statute and which it received in the court below."

The Government persisted in offering evidence of the receipt by Baldwin during 1954 of various cash payments as investments by various persons of a total of $23,000.00 ($20,000.00 in Arizona Material Service Company and $3,000.00 in Marion Development Company, in both of which Baldwin was a partner (App. 484, 499, App. 163-176), thereby unfairly influencing and inflaming the jury against Defendant-appellant, Baldwin. The necessary removal of the above sum from Baldwin's 1954 income would reduce said income accordingly.

The principal partnership in the case at bar is the limited partnership known as Arizona Material Service Company. (Defendant's Exhibits 1 and 42; Government's Exhibit 63.)

In the second paragraph on page 4, the Court of Appeals again discusses the subscriptions of various persons to the Arizona Material Service Company in the sum of $20,600.79 and states that approximately $11,500.00 of that sum was received by Defendant. No part of said $20,600.79 can be lawfully charged as income to Defendant upon any theory. Reference is made to Subdivision VII of this petition and the cases cited thereunder. *Even the* $11,500.00 *mentioned by the Court of Appeals could not be charged as income to Defendant upon any theory until there would be a complete accounting of the receipts and expenses of the partnership and until such accounting would show that some portion of the income of such partnership should be paid and was paid to Defendant as his share of the profits of such partnership for the year in question.*

Other partnerships are those existing between Defendant and Anselm L. Danitz, as the Marion Development and (App. 163, 169, 192-200) between Defendant and his brother, Charles A. Baldwin (App. 192-200).

Mr. Ronat testified positively that the various facts introduced in evidence by the Government were taken "from the records of the individuals who made investments with Arizona Material Service Co." (App. 394) In other words, the Government itself clearly and conclusively proved that all of the Arizona checks as well as the Danitz checks and the Marion Development checks were invested in a partnership.

Mr. Ronat was not aware, as an expert C.P.A., that where Defendant happened to be a partner in one or more partnerships throughout this case no income tax could attach to any of the receipts of said partnership until a final accounting of said partnership funds should be had and until it should be determined that the partnership did

have a profit. Then only can an income tax attach to a particular partner's profit to which he might be entitled upon such accounting. No such proof was ever offered by the Government. See cases cited under article VII of this petition.

Mr. Ronat was also not aware of Sec. 26 *U.S. Code* 613, 114 *which specifically provides that an investor* (Baldwin) *in oil and gas properties is entitled to a* 27½ *per cent depletion allowance on all such investments.* (26 U.S. Code 613, 114)

Before the Government could obtain any judgment against Defendant Baldwin as a co-partner of the limited partnership known here as Arizona Material Service Co. and that known as the Danitz partnership, it has the burden of proving that there was an accounting of the affairs of those partnerships, that there was a partnership profit and that Defendant was entitled to a definite share of those partnership profits. The Government offered no such evidence.

After the writer explained the law regarding partnership to Mr. Ronat, he still said his opinion would be the same; namely, that all of the Arizona Material Service Co. checks constituted income to Defendant (App. 395).

The Government also called as its witness Anselm L. Danitz (App. 163). Mr. Danitz (App. 337-338) testified that Government's Exhibit 98 for $2,000.00 and Gov. Ex. 99 for $1,000.00, both dated June 10, 1954, were payable to and received by Defendant Baldwin and said Danitz as partners and that said amounts, in Mr. Ronat's opinion, constituted income to Defendant and were not included in Defendant's tax return. The Government, by its own witness, Danitz, definitely proved the partnership relationship between said Danitz and Defendant under the name of the

Marion Development Company (App. 163, 165). Therefore, it is clear that $3,000.00 should have been declared partnership assets and should not have been declared income to Defendant Baldwin, one of the partners, for the year 1954.

The removal of the Baldwin-Danitz items of $2,000.00 and $1,000.00 from Mr. Ronat's estimate of the amount of taxable income for the year 1954 would reduce that estimate $3,000.00 accordingly.

In the first entire paragraph on page 2 of its opinion, the Court of Appeals mentions the fact that Defendant was one of two general partners and managers in a limited partnership known as Arizona Material Service Company, a promotion of Defendant.

Briefly, a partner in a partnership is taxed upon what profit he might make during a certain year after an accounting of the partnership business for that year shall have resulted in a profit to him. Until then there could not possibly be any question as to an income tax against any partner in any partnership.

All evidence as to the above two partnerships should be entirely disregarded as far as this case is concerned. See the cases cited under Section VII.

In his testimony (App. 577) Defendant thoroughly explained all of the various investments by various friends and acquaintances of himself and Craig (a witness for the Government). Defendant also thoroughly explained the business structure of the Arizona Material Service Co. (App. 588-590) as well as the Danitz partnership known as the Marion Development Co. (App. 595).

In *United States* v. *Doyle*, 234 F. 2d 788, the taxpayer was a concessionaire in games of chance at picnics, outings, etc. The Government built up its case by showing

substantial undeposited currency deposits and some withdrawals from safety deposit boxes. That Court there recognized that even such proof is *circumstantial in nature* and said (p. 793):

> "'Of course, proof under the bank deposit theory is *circumstantial in nature*, but we know of no reason why such deposits may not be considered in determining income, *when there is no evidence that they represent anything other than income.*" (Italics ours)

Again, while observing that the Government's proof here falls short of establishing that the items listed on its charts as "undeposited receipts" were indeed receipts of any kind, we call attention to the Second Circuit's views as to the limitation on the effect of such proof.

United States v. *Nunan*, 236 F. 2d 576, was an evasion case against a lawyer. The bank deposit and expenditure method was there used. As to the effect of the proof that Court said (p. 582):

> "The mere possession of large amounts of cash or the expenditure of large amounts of cash may well arouse suspicion and speculation, but it is well settled that *this proof, standing alone, will not suffice to establish that the amounts involved constituted taxable income*. (Citing cases)" (Italics ours)

At this point, we might well rest our argument. But here, entirely aside from the circumstantial evidence rule hereinafter discussed, the Government's own proof established that the items involved could not possibly be income in the cash basis sense.

All of the items relied upon by the Government for 1953 and part of those for 1954 were characterized as receipts from the sales of fractional interests in oil leases. The Government's own witnesses showed extensive application of these funds to drilling costs, commissions, kickbacks, swaps and the like.

Moreover, it must be borne in mind that by definition an interest in any oil or gas lease is, from its inception, burdened with inescapable costs—the original acquisition costs, brokerage fees, drilling obligations, and delay rentals for each and every month the property remains undrilled. As to such leases, a tax can only be computed on a capital gain or loss basis.

Without establishing the actual cost, and without regard to the known fact that oil and gas leases are so speculative and burdened at each stage of the proceeding, that even in cases of a strike, many times a loss rather than a profit is realized, how can it be said upon any theory that these receipts could count as income?

Here, the Government's own proof as to the nature of the interests involved, furnished the explanation found lacking in *United States* v. *Doyle*, 234 F. 2d 788.

> **Not only as to the essential element of income, but also on the issue of specific intent, the Government's proof, at its best, was circumstantial in nature; this being the case, the verdict cannot be permitted to stand since the evidence clearly is at least as consistent with innocence as with guilt, and all reasonable minds would so agree.**

In *Lloyd* v. *United States*, 226 F. 2d 9, the United States Court of Appeals for the Fifth Circuit reversed a conviction under Title 26, USCA, § 145(b). In the course of its opinion that Court discussed at great length the function of a Court on Appeals on review. Then discussing circumstantial evidence cases, the Court said (p. 13):

> "In circumstantial evidence cases this Court has said that the test to be applied is whether the jury might reasonably find that the evidence excludes every reasonable hypothesis except that of guilt. *Vick* v. *U. S.*, 5th Cir., 216 F. 2d 228, 232, cases there cited; see also *U. S.* v. *Levy*, 7th Cir., 138 F. 2d 429, 430, 431."

This Court's decision in the *United States* v. *Levy, et al.*, 138 F. 2d 429, involved a mail fraud. Of interest here is the statement in Judge Major's opinion as to the approach there taken by the Court in examining into the question of whether there was substantial evidence to support the indictment. Judge Major said (p. 430):

> "In doing so, we have especially kept in mind the rule so heavily relied upon that a conviction cannot be sustained where the evidence is as consistent with innocence as with guilt."

In *Elwert* v. *United States*, 231 F. 2d 928, the United States Court of Appeals for the Ninth Circuit had before it a case under 26 *U. S. Code*, Sec. 721 and its predecessors.

The Court first said (p. 932) as to the Government's burden:

> "The Government must prove that there was a tax owed to it by the defendant, and that he has done acts of evasion with a specific intent to defraud the United States."

The Court then went on to say (p. 933):

> "Here, as in most tax evasion cases, much of the Government's evidence is circumstantial. The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial *only* if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence." (Italics ours)

That the test on motion to direct, and that in applying the substantial evidence rule on Review are not quite the same, as appears from the use of the word "only" in discussing the agreement of reasonable minds on a reasonable hypothesis other than guilt in the above case. We believe this difference to be of no consequence here.

The Government here did not attempt to prove a "net worth" case; the Government here did not attempt to prove that either defendant's Ohio oil operations or the Arizona Material venture were, in fact, profitable. The Government's proof was at least one step away from establishing an unexplained and reported deposits case. There is nothing in this record to show either venture was profitable in any sense of the word. The indications from the undisputed testimony are actually to the contrary.

We submit that all the evidence is, indeed, consistent with the theory that the profit, if any, on the Ohio oil operations was, at best, a hope, not a realization, and that the remaining items on the Government's 1954 claim, if anything, were subscriptions by others to the capital of partnerships, and as such not taxable.

VIII.

REGARDLESS OF ALL OTHER QUESTIONS AND CONSIDERATIONS IT IS THE HEAVY RESPONSIBILITY OF A REVIEWING COURT TO ASCERTAIN IF A DEFENDANT HAS HAD A FAIR AND IMPARTIAL TRIAL, THAT IS, A TRIAL FREE FROM PREJUDICIAL ERROR.

In the case of *United States of America* v. *George E. Phillips*, 217 F. 2d 435, that Court said, in closing its opinion, p. 444, ". . . Regardless of all other questions and considerations, however, it is the heavy responsibility of a reviewing court to ascertain if a defendant has had a fair and impartial trial, that is, a trial free from prejudicial errors."

Following are schedules of Mr. Ronat's determination of Defendant's alleged additional income for 1953 and 1954 subject to Defendant's objections hereinafter set forth.

I. 1953.

Mr. Ronat testified that the complete total of unreported items (App. 330) for the year 1953 is $34,884.07.

In arriving at the above figure Mr. Ronat states, "That completes the total of those items for that year" (1953) $36,744.07.

"Another figure below the total is $1,860.00. Mr. Ronat says 'That again represents the items of non-currency deposited, traceable through deposit slips through various bank' accounts included in the chart."

Mr. Ronat stated that the final net total is (App. 330) $34,884.07.

Later he states: "By my analysis and by the assumptions which I mentioned in my opinion I arrived at what I considered to be the corrected adjusted gross figure. To arrive at that figure the combined totals of the adjusted gross income as reported is $3,473.23 added to the $29,523.90 that I described earlier to arrive at a corrected figure of (App. 332) $32,997.13."

In his estimate of the Defendant's 1953 adjusted gross income, Mr. Ronat had admittedly included many items shown by the Government's exhibits.

Government Exhibits in evidence show receipts of investments by various purchasers of oil interests from Defendant during 1953 totalling $45,175.69.

On App. 329 Mr. Ronat said, "That completes the total of those items for that year. $36,744.07. Another figure below the total is $1,860.00. That again represents the items of non-currency deposited traceable through deposit slips through various bank accounts included in the chart. Those items that have a little star on them. The total of $1,860.00 deducted from the $36,744.07 arrives at a net total of $34,884.07."

The total of all exhibits that were admitted in evidence by the Court as Defendant's expenses during 1953 is $43,502.44. The figure is taken from the actual total of all of Defendant's exhibits that were allowed in trial (App. Vol. IV, pp. 33-62). This leaves an actual loss of $8,618.37 for the year 1953 at this point (App. 329) over and above Mr. Ronat's estimate of Defendant's 1953 loss.

John Edgar Brown, a Government witness, testified that Defendant had actually paid him approximately $15,550.00 for drilling wells during 1953 (App. 201-207). This figure increases Defendant's total loss for 1953 to $24,168.37.

H. Pruett, a Government witness, testified that Defendant had paid him about $20,000.00 for drilling wells during 1953 (App. 130-139). This expense would increase Defendant's loss for 1953 to $44,168.37.

II. 1954.

Mr. Ronat testified that the complete total of unreported items for 1954 (App. 348) was	$47,021.00
and that there are additional deductions which were not claimed on the return for 1954 (App. 458)	14,690.80
This reduces corrected total to	$32,330.20
His corrected gross income after these adjustments is	$33,402.12

In his estimate of Defendant's 1954 adjusted gross income Mr. Ronat had admittedly included many items shown by Government's exhibits.

Included in Mr. Ronat's estimate of the amounts on which, in his opinion, Defendant should pay a tax for 1954 is the approximate sum of $26,100.79, which must be deducted from Mr. Ronat's estimate of taxable income of

$32,330.20 or $33,403.12, whichever is correct. This would, at that point, leave either $12,129.41 or $13,302.33 of additional income to be taxed to Defendant, depending upon which of Mr. Ronat's figures is correct.

Ronat says it now becomes $47,021.00, rather than $49,421.79. The present adjusted total is $51,750.00, even.

The Government witness, Craig, testified that Defendant sent him somewhere between $13,000.00 and $17,000.00 (App. 211). Baldwin personal checks approximated $4,000.00. This shows without question that Defendant paid out more than he received as investments from the two partnerships.

Mr. Ronat testified that he made the same type of analysis for 1954 that he did for 1953 (App. 332) and that he had in his possession and used during that analysis the monthly bank statements of the Milliken National Bank, the National Bank of Decatur, the Commercial National Bank of Grand Island, Nebraska, and the First National Bank of Decatur (App. 332).

A list of the exhibits offered and admitted on behalf of Defendant for 1953 and 1954 is included in Volume IV of the Appellant's Appendix (pages 33-118). The total of the amounts allowed to Defendant (pages 33-62) for 1953 is $43,502.44. That on pages 63 to 118 for the year 1954 is $63,551.80. In other words, those totals represent a portion of Defendant's business expenditures during 1953 and 1954. Ronat entirely ignores those exhibits actually admitted in evidence by the Court.

At that point, therefore, and according to Mr. Ronat's estimate as an expert Certified Public Accountant, Defendant operated at a loss during the years 1953 and 1954.

According to the Government's own evidence at the close of Attorney Pierson's testimony as its own first witness (App. 7-18) Defendant had no income in excess of that reported by him for the respective years 1953 and 1954. At this point, therefore, the Government, by its own evidence, proved defendant not guilty.

Attorney Pierson testified that he considered his figures the ultimate figures and that Defendant relied on his (Pierson's) services. Under those circumstances, Defendant could not possibly be guilty of willfully evading any income tax for those years. Mr. Harlington Wood, Jr., the Government's able counsel, proved, by the Government's Exhibit 1, 2, 3-B, 4-A, 5, 8-B, 9-B and 10-A, the Defendant not guilty, not only because the income tax reports actually filed were correct, but also by reason of the further fact that the Government's own exhibits in the form of Defendant's bank statements showed no income to him whatsoever for either year. After having proven defendant *not guilty*, the Government proceeded to introduce other witnesses and documentary evidence to prove that he did owe more tax for said years 1953 and 1954 than he had reported. The Government's own witness, Attorney Pierson, clearly shows the correctness of defendant's income tax report for 1953 and 1954 (App. 10-11). Attorney Pierson also testified as a witness for Defendant (App. 1049-1058).

The Government has proven the various receipts of money by Defendant by the testimony of some 57 witnesses who were called by the Government. These witnesses, with scarcely an exception, testified that they paid the various individual sums invested by each of them with Defendant for interests in oil and gas leases. In other words, the Government's own witnesses proved beyond a doubt that

Defendant exchanged interests in oil leases for the various cash payments and checks in the usual course of business. The Government did not continue with its evidence by offering some proof of the value of the lease interest assigned. On the contrary, the Government stopped with the proof of the exchange of an interest in an oil and gas lease for a check or for cash and called each item income.

A list of over 1090 exhibits offered and the great majority admitted on behalf of Defendant is included in Volume IV of Appellant's Appendix, pages 33-118. The total of the amounts allowed to Defendant as set forth in said exhibits for the year 1953 is $43,502.44 and for the year 1954 is $63,551.80.

In other words, that total represents a portion of Defendant's business expenditures during that year in so far as same are admitted in evidence. *Each exhibit so admitted is so marked* (App. Vol. 4, pp. 33 to 118).

It is elementary that the amount on which Defendant should be taxed would be the difference between the amount received by the Defendant during the taxable year and the amount of expenses of conducting his business. Upon this theory, Defendant would not owe any tax whatsoever, for the definite reason that the actual figures in this record clearly indicate that Defendant suffered a loss rather than a gain in both 1953 and 1954. Accordingly, he paid more tax than he owed for 1953.

Mr. Ronat, with great care, determined what he considered defendant's overdrafts amounted to for the year 1953 (App. 319-329). Finally, he concluded that a net total of $34,884.07 should be declared to be Defendant's income (App. 329). In arriving at that figure Mr. Ronat, in his usual way of deciding all questions against a fel-

low citizen, even though an employee of our own government is required by all rules of that government to be fair to a fellow citizen, entirely overlooks the undisputed fact that the unexplained amounts of money on deposit in Defendant's various bank accounts far exceeded the above sum of $34,884.07. Mr. Ronat entirely ignores the testimony of the Government's own witness, H. G. Pruett, that Defendant had paid said Pruett at least $20,000.00 for actual drilling and other well work during 1953 (App. 133, 135, 136). Mr. Ronat would have the court believe that Defendant never had any expenses in the conduct of his business.

Again, he testified that his chart, Government Exhibit 150, shows $29,523.90 to be Defendant's unreported income for 1953 (App. 331, 332).

Mr. Ronat, as a leading witness for the Government, would have this Court rely upon his testimony, particularly with reference to the charts exhibited to the jury (Gov. Exhibits 150-A, 151-A). The jury was led to believe that these charts were copies of Defendant's bank statements. Mr. Ronat told the jury that he prepared Government's Exhibits 150 and 151 since the start of the trial and that they would have to compare them (App. 363) with the copies of the charts and Government Exhibits 150-A and 151-A, before they could tell whether those exhibits were exact copies of the charts. He then told the jury that those exhibits did not include all deposits made by Defendant and as shown in the bank statements.

The Government's entire financial or accounting argument is subject to the basic fallacy we have above presented—it is based entirely on the proposition that every dollar that passed through Defendant's hands must be "income". In the presentation of the case to the jury, this basic error in theory was compounded doubly. First,

over objection (App. 313) the Government expert Ronat was permitted to testify that in his opinion each and every of such items constituted "income" (App. 313 ff.); second, over objection (App. 306-7) prepared charts, setting forth every dollar claimed to constitute income by the government using the inflammatory words *"ITEMS NOT DEPOSITED,"* were exhibited to the jury and explained in detail by Ronat (Gov't. Ex. 150 A, 151 A) (App. 315 ff.)

(It is to be noted that Defendant's Appendix, Vol. IV, p. 31, 32, erroneously states that these charts were not admitted.)

Both the Accounting Method Adopted by the Government and the Use of Charts in the Mode Followed in this Case Have Been Severely Criticized.

We have already called attention to the incongruity involved in treating sales of partial interests in leases as income. When the production stage is reached, these interests have income tax features which apply to them alone (*i.e. percentage depletion provisions*, 26 *U. S. Code* 613, 114). The capital gain or loss basis is the only way taxable income properly can be determined as to such interest, and the Government chose not to proceed on that basis.

The method actually adopted by the Government has been the subject of severe criticism, and at least one court has held that it cannot be applied to the taxpayer himself, even though his basic return was on a cash receipts and disbursements basis.

In *Morrison* v. *United States*, 270 F. 2d 1, the United States Court of Appeals for the Fourth Circuit affirmed a conviction of the taxpayer's accountants by a split decision. The Revenue Agents there used the same method adopted here. One of the principal contentions of the defendant was that the Government's computations should

not have been admitted in evidence. This was a proceeding against the accountants who prepared the return, not the taxpayer. The Court justified the admissibility of the proof as against the accountants solely because the agents had adopted the accountants' own method of accounting. Thus the Court said (p. 3, 4):

> "It is quite true that such a computation would not be admissible *if inquiry here was directed simply to the tax obligations of the taxpayer.* In this criminal proceeding it was necessary to establish not only that the tax liabilities here were understated, but that the understatement was attributable, at least in part, to the fact that the taxpayer's returns were not honestly prepared. Proof of the latter fact could only be accomplished by adopting and consistently applying the taxpayer's own method of accounting, *despite the fact that we are all agreed that the method, itself, is improper, or less reliable than some other method.*" (Italics ours)

The courts have also sharply criticized the use of charts in the mode employed here, recognizing the inherent danger of unfairly and unduly impressing the jury by them.

In *Lloyd* v. *United States*, 226 F. 2d 9, where, as we have stated, the conviction was reversed, the Court of Appeals said (p. 17):

> "The use of this type evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a "trial by charts," however impressive the array produced. Ordinarily, it would be

the better practice, not so carefully observed in this instance, to require that the source of the facts and figures upon which such a chart is based be fully disclosed before its admission into evidence. Whenever possible, such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, and they should not be encumbered by such impressive, conclusionary captions as 'Overstatement of Merchandise Purchases' 'Overstatement of Delivery Expenses', 'Unreported Cash Receipts of Lloyd's Bakery', 'Unreported and Undeposited Cash Receipts Invested in United States Savings Bonds', 'Unreported Net Income of Mr. E. C. Lloyd', 'Income Tax Unreported and Unpaid by Mr. Lloyd', such as were used on the Government charts here in dispute. While a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phrases upon charts results from a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or authenticated documentary evidence."

The Government approaches this Appeal as if the only question open on this appeal is the substantial evidence question. This is not the fact. The matters above discussed do, indeed, show the lack of substantiality in the Government's proof but also as constituting prejudicial error in the admission of evidence.

In our view, not only was the Government's evidence theory wrong, but also Ronat's testimony was inaccurate and misleading in important particulars, as were his charts.

In part this difference may be explained away by duplications, but the plain fact is that the Government view took everything it could find as income and allowed as

credits only those items proved by checks and documents in the hands of persons other than Defendant. Direct testimony as to substantial items of drilling expense and the like are utterly ignored by the Government.

Again (App. 364), Mr. Ronat admitted that he showed one deposit of $750.00 on May 28 and another deposit of $1,750.00 the same day, when, as a matter of fact, the actual bank statements showed one deposit of $2,500.00 on that date. In another instance he testified that the Milliken Bank deposit was $1,000.00, but that he listed the deposit on Government Exhibit 150-A (the chart) as $850.00. His reason for that change (App. 366) was that a part of the deposit was a N.S.F. check for $150.00 signed by a witness Wingate, a payor of alleged income to Defendant (Gov. Exhibit 57) (App. 322).

Expert Ronat took the following position at the trial and in his charts. Thus he testified (App. 488):

> By The Witness: Baldwin held, as I recall, a twenty-five per cent interest in the company.
>
> Q. Well then, if he held a twenty-five per cent interest why do you charge the full amount paid to Arizona as a non-deposit against him?
>
> A. *Because the funds were being collected through him to be transferred to the company.* (Italics ours)

And again Ronat testified (App. 489):

> Q. Do you know anything about those particular facts that you have just stated?
>
> A. As to which of these particular checks went to the company there is no way to identify them, sir. I don't know as to the particular items. *Still I charge him with the whole amount.* (Italics ours)

Mr. Ronat persists in declaring a check, dated 6-27-53 (Government Exhibit 105), from Scherer to Defendant for $1,000.00 as income to the latter, although Ronat testi-

fied (App. 427-428) positively that Defendant endorsed the check to J. D. Gant, whom Ronat knew to be a building contractor, and that Gant received the check from Defendant on account of said building services. Ronat went more into detail (App. 428) on the building question and stated definitely that the check was applied on the building by endorsement to Gant. That same check could as well have been, and should have been, charged to expenses. It became expenses immediately upon its endorsement to Gant. There can be no other construction of the dealings between Scherer and Defendant as well as between Defendant and Gant. That $1,000.00 should be deducted from Ronat's determination of 1953 income.

As an example of Mr. Ronat's attitude toward Defendant, for instance, consider the alleged investment by Defendant's brother-in-law, John Kozak in Defendant's oil interests (App. 24-28). The Government is bound by Kozak's testimony as its own witness. He testified that the interest in the oil lease which he received from the defendant was merely a gift to him by Defendant, that Defendant always intended to repay the entire $1,000.00 to Kozak and actually did repay several hundred dollars of said amount to him. During the trial, Defendant also called Kozak as a witness. The latter's testimony was clearly in proof of a loan by him (App. 24-28).

Mr. Ronat testified that, during his investigation, he had interviewed Kozak, who told him that Defendant had paid back between $300.00 *and* $500.00 *on the loan; and yet Mr. Ronat testified, "I called it a payment of an oil interest,"* (App. 427-428) (*a theory most favorable to the Government*). (Italics Ours)

One outstanding example of Mr. Ronat's error as an expert is the final decision which he made with reference to charging Government's Exhibit 28 entirely as income

to Defendant. The undisputed facts are as follows: one of the Government's witnesses, Clifford R. Alderson, of Grand Island, Nebraska, representing Government's witness, C. J. McIntosh, and some other investors, gave McIntosh a bank draft for $12,000.00, payable to Defendant Baldwin, to take to Defendant at Gallipolis, Ohio, in February, 1954 (App. 73, 74).

McIntosh himself testified that he, Alderson and Gerald Rock were interested in some oil leases that Defendant had in Ohio (App. 61). Mr. McIntosh testified that out of said $12,000.00 draft he gave Defendant $2,000.00, Gerald Rock $1,000.00 in cash and a draft for $4,000.00, and kept $5,000.00 for himself (App. 66-68, 70). McIntosh gave Defendant only $2,000.00 to which fact both McIntosh and Defendant testified. Both Ronat and McIntosh testified that Defendant deposited same in the latter's account in the Gallipolis bank. In spite of the above uncontradicted evidence introduced by the Government, Mr. Ronat, who claims to be an expert C. P. A., testified that the entire $12,000.00 was income to Defendant and that he charged that amount to him as such (App. 389, 390).

At this point Defendant should have been found "not guilty of willful income tax evasion" for the reason that he employed an attorney to prepare and file his income tax reports for 1953 and 1954. Both Defendant and his attorney, Roger V. Pierson (Government's witness) testified that they believed the reports as prepared and filed were true (App. 10-11, 708-709). Defendant testified that he never intended to file an incorrect income tax report for either year (App. 708-709). In those cases cited by Defendant under Article II of this brief the Court has universally held that when a citizen employs an accountant or an attorney to prepare and file his income tax report such citizen can not be convicted of income tax evasion.

In any event Defendant can not be found guilty of willfully evading his income tax which is another reason why he should be found not guilty here in this case.

The following amounts should be deducted from Ronat's estimate of additional income to Baldwin, therefore, for the year 1953:

Gov. Ex. 28—Ck to Alderson	$10,000.00
No Ex. No. Kozak alleged investment really a loan to Defendant	1,000.00
Gov. Ex. 105—Gant ck used by Defendant for building purposes	1,000.00
Gov. Ex. 57—Wingate nsf ck	1,500.00
Gov. Ex. 17—Haley received a refund of this	750.00
Gov. Ex. 81—Scherer signed Baldwin's name without authority	1,000.00
Schmode ck to Scherer (not Baldwin)	1,000.00
George Baldwin paid to Gov. witness Chas. A. Baldwin	7,500.00
	$23,750.00

At this point it again appears entirely clear that Defendant was not proven guilty, beyond a reasonable doubt, of evading a Government income tax.

In the last paragraph on page 2 of this Court's opinion, the Court states as a fact that Defendant "also maintained *secret deposits* of like receipts with a brother and *another person* which were not reported." (Italics ours) Albert Baldwin is the only brother of Defendant to which this statement could possibly apply. Albert Baldwin was a witness for the Government. He directly testified that the reason that deposits were made in his account by Defendant was to enable Defendant to procure more quickly the cash on such deposits when needed. (App. 182, 190) Albert Baldwin, the Government's witness, directly testified that

he repaid to Defendant all monies so deposited. (App. 189) There is absolutely nothing in the record to support this Court's statement that secret deposits were made to "another person" which were not reported. The only "other person" referred to by this Court must be Charles Baldwin. Charles Baldwin also is a brother of Defendant and was called as a witness by the Government (App. 192-200). Charles Baldwin testified that he had deducted from Defendant's funds in the possession of Charles Baldwin $7,500.00 to cover Defendant's loss in a Jackman deal (App. 196-198). The Government does not appear to have ever deducted this loss from its alleged claim against Defendant for unpaid income taxes for 1953.

In the last paragraph of page 2 of the opinion of the U. S. Court of Appeals, that Court states that the evidence indicates that there were undeposited gross receipts of over $34,000.00, making Defendant's actual gross income approximately $88,000.00. The majority of items going to make up the alleged undeposited gross receipts of $34,000.00 were purchases by various parties of oil and gas interests from Defendant. These investors would be included in the more than 50 witnesses mentioned by that Court in the second entire paragraph on page 3. By reason of the fact that each of said witnesses specifically testified that they were purchasing interests in oil and gas leases already owned by Defendant, there is no theory upon which those items of investment could be charged as income to Defendant. Again this Court's attention is respectfully called to the fact that all of the witnesses so testifying as to purchases of oil and gas interests from Defendant were the Government's own witnesses. It necessarily follows that the Government would be bound by their testimony.

The U. S. Court of Appeals entirely overlooked and failed to consider, on the question of falsity, the cases set forth under Subdivisions II, III, IV, V and VI of this petition.

The U. S. Court of Appeals failed to consider, and, in fact, disregarded its own specific ruling in all of the cases cited as above in this petition, holding that all questions as to the guilt of this defendant must be proved beyond a reasonable doubt. In fact, the Court of Appeals, in its opinion, does not even discuss the question of "beyond a reasonable doubt." In fact, that Court has repeatedly held in the cases cited under Subdivision IV of this petition that *the burden of proving defendant guilty of every element in the willful evasion of an income tax beyond a reasonable doubt rests upon the Government from the beginning to the end of the trial.* That Court entirely overlooks the testimony of Roger V. Pierson, Defendant's attorney (the first witness called by the Government) that in the consultations between Defendant and his said attorney, many, if not most of the receipts included in his income tax returns were brought to the attention of Attorney Pierson in his preparation of said income tax returns. In the last paragraph of the Opinion of the U. S. Court of Appeals, on page 5, that Court entirely disregards the testimony of said Roger V. Pierson, the Government's own witness. That Court intimates in said last-mentioned paragraph of its Opinion that Defendant did not make a full disclosure of all of the facts to his attorney, Pierson, the Government's own witness, who testified that he did make such full disclosure.

In view of the condition of the record in this case, the jury in the trial court could not possibly fairly determine that Defendant filed a false return or that he had any adjusted gross income for the years 1953 and 1954.

On page 3 of the Opinion of the U. S. Court of Appeals, that Court calls attention to the fact that the record in this case covers over 3,000 pages and that there were over 1,000 exhibits. The Government's exhibits amounted to 159 (Vol. 4, pp. 1-32). Defendant's exhibits amounted to 1092 (Vol. 4, pp. 33 to 118). Government witness Ronat, in his testimony regarding Defendant's alleged income for 1953 and 1954, persistently evaded testifying with reference to any of the 1092 exhibits actually admitted in evidence on behalf of Defendant, although he admits that he had all of those exhibits in his possession for nearly two years before he caused the indictments of Defendant (App. 376).

In the second paragraph on page 4 of its opinion the Court of Appeals again discusses the subscriptions of various persons to the Arizona Material Service Company in the sum of $20,600.79 and states that approximately $11,500.00 of that sum was received by Defendant. No part of said $20,600.79 can be lawfully charged as income to Defendant upon any theory. Reference is made to Subdivision VI of this petition and the cases cited thereunder. Even the $11,500.00 mentioned by this Court could not be charged as income to Defendant upon any theory until there would be a complete accounting of the receipts and expenses of the partnership and until *such accounting would show that some portion of the income of such partnership should be paid and was paid to Defendant as his share of the profits of such partnership for the year in question.*

The Court of Appeals has entirely overlooked the fact that the Government has charged Defendant with $3,000.00 as income from a partnership known as Gdanitz & Co. (App. 163, 165, 337, 338).

Conceding, for the purpose of argument, that Defendant did advise his attorney (the Government's witness) that he had received many items of alleged income in contro-

versy here, there was no ground for the jury in the trial court, or for the Court of Appeals, to hold that Defendant *falsely* omitted certain items of income from his reports. Again, we state that the testimony of the Government's own witness, Pierson, required a finding by the jury and by this Court that Defendant did not wilfully and intentionally attempt to evade any income taxes for the years 1953 and 1954. In such case, the Government's case clearly fails, and the judgment of the trial court and the Court of Appeals in favor of the Government should be reversed.

There is no basis in the testimony in this record for the holding on Page 5 of the Opinion of the Court of Appeals.

In the last two paragraphs on page 4 of the opinion of the Court of Appeals that Court holds that the Government's evidence is sufficient to establish a specific and wilful attempt on Defendant's part to evade the payment of his income taxes for the years 1953 and 1954. We repeat that this Court has entirely overlooked and disregarded the definite testimony of Attorney Roger V. Pierson, the Government's first witness (App. 6-18), as well as the undisputed testimony of Defendant (App. 708-709). *Nowhere in this record does any other witness offered by the Government even claim the contrary.*

On page 5 of the opinion of the Court of Appeals holds that the question of good faith reliance upon Defendant's attorney was a question for the jury to determine under proper instructions. That Court further finds that there is ample evidence showing that Defendant did not fully disclose the relevant facts to his attorney. That Court has entirely disregarded and overlooked the uncontroverted testimony of Roger V. Pierson, Defendant's attorney, and

the Government's own first witness to the contrary. (App. Vol. I, pp. 8-18) The substance of that testimony is set forth in pages 6 and 7 of this petition for a writ of certiorari. Surely the jury would have no right to disregard the Government's own undisputed testimony by its own witness, entirely supported by Defendant's own undisputed testimony that he never even intended to conceal anything from the Government. (App. 708-709) The undisputed testimony of the Government's own witness (Pierson) proves beyond question that Defendant made a full disclosure of all facts to his attorney, Roger V. Pierson.

On the question of wilful evasion, the undisputed testimony of the Government's own witness, Ronat, shows that said government agent called on Defendant at his home and requested that Defendant exhibit all of his books and records including his bank statements to him. (App. 309, 312, 376) Defendant immediately agreed to furnish said books and records and told Mr. Ronat to contact Roger V. Pierson, Defendant's attorney and a witness on behalf of the Government. Mr. Pierson cheerfully delivered all of said books and records to Mr. Ronat, the government agent, who had the exclusive possession of the same from August, 1957 until April, 1959 (App. 309, 312, 376). This was according to Ronat's own testimony. Surely, Defendant could not be charged with any intention whatsoever, up to that point, of cheating the Government out of income taxes. The Court of Appeals entirely overlooks the above facts, and that Court further entirely overlooks the undisputed testimony of Defendant himself where he states, in answer to a direct question, that he had no intention of concealing anything from the Government. (App. 708, 709) To support its decision in this regard the Court of Appeals depends solely upon the statement that Defendant received various items of income.

The following is a resume of the figures covering Petitioner George E. Baldwin's income for the years 1953 and 1954:

MR. RONAT'S FIGURES RE BALDWIN INCOME

1953

Mr. Ronat testified that the additional receipts for 1953, not reported, amount to $34,884.07. (App. 329)

Less deductions as per this petition page 33	$23,750.00
Deduct actual expenses admitted by Court to Baldwin and disregarded entirely by Ronat—(see App. Vol. IV pp. 33-61	43,502.44
Total disbursements:	$67,252.44
Deduct Ronat's alleged additional income which he says was not reported	34,884.07
Actual loss for 1953:	$32,368.37

MR. RONAT'S FIGURES RE BALDWIN INCOME

Mr. Ronat testified that the receipts for 1954, not reported, amount to $47,792.70 (App. .....)

Deduct investments by various persons through Defendant Baldwin in Arizona Material Service Co. partnership	$20,600.79
Deduct investments by various persons through Defendant Baldwin in Danitz Partnership	3,000.00
Disbursements allowed to Baldwin by trial Court (App. Vol. IV pp. 63-118)	63,551.80
	$87,152.59
Deduct Ronat's figure for receipts not reported	47,792.70
Loss for 1954:	$39,359.89

There is absolutely no basis for the findings of the Court of Appeals in any part of its opinion.

CONCLUSION.

From the testimony of Attorney Pierson, the Government's first witness, it is entirely clear that the indictment against Defendant must be dismissed for the reason that Defendant employed Attorney Pierson in good faith to prepare and file his income tax reports for 1953 and 1954, that he fully disclosed to his said attorney the necessary and complete facts with reference to his income, and that he acted upon the advice of his said attorney. (See Subdivision II hereof and the cases there cited.)

It necessarily follows from the testimony of the Government's said witness, Pierson, that Defendant did not *deliberately* fail to include any items of income in his return. (See Subdivision III hereof and the cases there cited.)

Under all of the rules of fairness and justice laid down in the cases herein cited, the Government must prove and did not prove *beyond a reasonable doubt* from the beginning to the end of the trial that Defendant did *deliberately* and wilfully fail to include certain items of income in his returns. (See Subdivisions III and IV hereof and the cases there cited.) This the Government failed to do.

It is just as clear from the rules laid down in the cases herein cited that fraud is never presumed but must be established by clear and convincing evidence. The Government Agent, Ronat, never mentioned the word "fraud" in his entire testimony as against Defendant. (See Subdivision VI hereof.)

In fact, the decisions of the various Circuits of the U. S. Court of Appeals as well as the decisions of this Court go so far as to repeatedly hold that a final element neces-

sary for conviction is *wilfullness involving a specific intent which must be proved by independent evidence and which cannot be inferred by the mere understatement of income. The Government offered no such independent evidence.* (See Subdivision V hereof and the cases cited thereunder.)

The trial court as well as the Court of Appeals erred in even considering the evidence regarding the two partnerships, Arizona Material Service Co. and Danitz Co.

This Court's attention is also respectfully called to the fact that the Government introduced as its own evidence Defendant's various bank accounts for the years 1953 and 1954. At the very beginning of the trial the Government introduced exhibits without any restrictions and without stating that many of the deposits in the different banks were duplicate deposits; that is, a check on one bank would be deposited in another bank. Those duplicate deposits totaled over $22,000.00 for 1953 (App. 397) and $9,000.00 for 1954, thereby reducing the total deposits. The actual bank balances at the end of 1953 for all banks totalled $435.48 and at the end of 1954, $271.32. The Government made no effort to explain the deductions shown from said bank accounts. The Government is bound by what those bank statements actually show, namely the actual balance on hand at the end of each year in all of said banks.

The Government made no effort to explain any of the deductions set forth in the bank statements. The Government entirely failed to identify many of the deposits but claimed them all as income.

No matter in which manner the actual correct final figures are determined there can be no net income to Defendant Baldwin for either 1953 or 1954. Arthur A. Ronat, the Government C.P.A., studiously avoided testifying regarding some 1,000 Baldwin exhibits actually admitted in evidence (App. Vol. IV pp. 33 to 118).

The inescapable conclusion from the bank statements introduced in evidence by the Government is that Defendant was "stone broke" at the end of each year, 1953 and 1954.

At this point it appears entirely clear that Defendant, George E. Baldwin, at all times acted upon the advice of his attorney, Roger V. Pierson, after furnishing his said attorney with all information in his possession as to his 1953 and 1954 income tax reports; that no fraud was proven on the part of petitioner, George E. Baldwin; that he did not at any time deliberately or wilfully fail to include any item or items of his income in his income tax reports for 1953 or 1954; *neither did the Government offer any independent evidence of wilfulness or specific intent on the part of petitioner, George E. Baldwin, to evade any income taxes for either* 1953 *or* 1954 *and that said George E. Baldwin, was not proven guilty of the charges in the indictment herein.*

Petitioner, George E. Baldwin, therefore respectfully petitions this Honorable Court for the issuance of its Writ of Certiorari in this Cause.

Respectfully submitted,

HARRY C. KINNE
Attorney for
George E. Baldwin
Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 13354 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GEORGE E. BALDWIN,
Defendant-Appellant.

Appeal from the United States District Court for the Southern Dis- of Illinois, Southern Division.

July 26, 1962

Before CASTLE, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Defendant, George E. Baldwin, after indictment in two counts charging him with willfully filing false and fraudulent income tax returns for 1953 and 1954 in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U.S.C. §145(b), and Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. §7201, was convicted by a jury on both counts. He was sentenced to imprisonment on the first count with probation to follow on the second count.

Defendant appeals primarily on the ground that the government's evidence was insubstantial and does not

support the verdict. Specifically, his grounds for reversal can be stated: (1) that his expenses exceeded his income during the years in question and therefore, since no tax was due the government, he cannot be convicted of tax evasion; (2) that he is charged with receiving income in 1954 which was, in fact, non-taxable partnership income; (3) that the government's evidence did not establish the necessary element of willful evasion; and (4) that in filing his returns he acted in good faith on the advice of his attorney.

During 1953 and part of 1954, defendant was in the business of buying and selling oil leases and promoting the reactivation of old oil wells in a field located in Ohio. During the latter part of 1954, he was one of two general partners and managers in a limited partnership known as Arizona Material Service Company, a promotion of defendant for the development of a manganese mining claim in Arizona.

In January, 1954 defendant filed a joint federal income tax return with his wife for the year 1953 in which he reported an adjusted gross income of $3,473.23 with a tax of $162 due thereon. In January, 1955, defendant filed his individual income tax return for the year of 1954 in which his reported adjusted gross income was $1,072.92 with no tax due. The indictment charged that defendant's actual adjusted gross income in 1953 was $28,748.71 with a tax of $8,239.38 due, and that his actual adjusted gross income in 1954 was $42,230.72 with a tax of $19,278.20 due.

Defendant's 1953 return reflects gross receipts in the approximate amount of his bank deposits. The evidence indicates, however, that there were undeposited gross receipts of over $34,000, making his actual gross income approximately $88,000. Testimony of government wit-

nesses and documentary exhibits show that defendant received cash, checks, and money orders from his business which he did not deposit in his bank accounts but used directly to pay business and personal expenses and to make capital investments. These amounts were not reported. He also maintained secret deposits of like receipts with a brother and another person which were not reported. It is not seriously contested by defendant that he did not accurately report his gross receipts for the year 1953 and that the actual total was what the government's evidence indicated. Defendant maintains, however, that the government failed to prove that his adjusted gross income for 1953 was understated in a substantial amount. His contention is to the effect that his allowable expenses in 1953 were over $107,000 and therefore he not only owed no tax, but actually is entitled to a refund.

The question presented is whether defendant's claimed expenses are supported by the evidence. An examination of the record shows they are not.

More than fifty witnesses testified for the government with respect to payments made to or received from defendant. Their testimony and that of defendant's witnesses covers over 3,000 pages of the transcript, and the exhibits, consisting mainly of checks and receipts, number over 1,000. We believe that to detail each item of claimed expense would serve only to lengthen unduly this opinion; rather, we think it suffices to say that the total documentary-supported allowable expenses for 1953 was approximately $43,000, and consequently, defendant's understatement of adjusted gross income for 1953 was approximately $42,000.

Defendant similarly in his 1954 return inaccurately reported his gross receipts and allowable expenses and consequently, falsified his adjusted gross income. Defendant's 1954 return shows a gross income of $25,917.69. The

evidence indicates, however, that for that year he had approximately $47,000 of income that was deposited in his bank accounts and an additional amount of approximately $47,000 income that was not so deposited, making his total gross income over $94,000. Defendant disputes the correctness of this sum. In a table in his brief purporting to show his total income and disbursements defendant lists his receipts as $47,792.70. The amount, however, represents only income deposited in banks and omits the $47,021 representing undeposited income. Defendant claims allowable disbursements of $114,192.75. The government's evidence indicates, however, that his actual allowable expenses were only approximately $69,000.

Defendant's claimed disbursements for both years include duplication of expenses, personal expenditures, investments of capital, and other non-deductible items. For example, he included as allowable disbursements the cost of his and his family's personal living expenses, the costs of remodeling his home, and the purchase of an apartment building.

Defendant contends that the government incorrectly charged him with a total of $20,600.79 income from the Arizona Material Service Company partnership, since the government's computation of his adjusted gross income did not recognize his claim of disbursements for the partnership in this amount, which claim appears in the table of his alleged income and allowable expenses.

The evidence indicates that the subscriptions from the limited partners totalled approximately $20,000. The evidence also shows that approximately $11,500 of this sum was received by defendant. The government does not dispute defendant's contention that the amounts he received from the partnership fund were spent by him in behalf

of the partnership. The untenableness of defendant's position, however, lies in the facts, first, that the government is not charging him with having received $20,600.79 from partnership funds, but only approximately $11,500, and second, that defendant seeks to deduct partnership expenses in the amount of $20,600.79 without crediting his gross income with the $11,500 of partnership funds that the government traced to him. In other words, defendant does not take into account the fact that he was reimbursed in whatever amount he actually expended for the partnership from its working capital. Thus, his deduction for partnership disbursements without giving recognition to his reimbursement had the effect of inaccurately and falsely decreasing his adjusted gross income by the amount of the claimed disbursements.

In sum, the government's evidence supports the charges of the indictment that defendant understated his adjusted gross income in his 1953 and 1954 tax returns in substantial amounts.

Defendant's third contention that the government did not establish a willful evasion of his federal income taxes is also unsound. This contention raises a question which we believe was properly given to the jury for determination, since we are convinced that the evidence is sufficient to establish a specific and willful attempt on defendant's part to evade the payment of his income taxes. The jury, under proper, agreed upon instructions, decided against defendant and we find no justification to interfere with its verdict.

Defendant's fourth contention is that in filing his 1953 and 1954 returns he acted in good faith on the advice of his attorney who prepared them. The question of good faith reliance upon his attorney, however, was a matter for

the jury to determine under proper instructions since we are convinced that there is ample evidence showing that defendant did not fully disclose the relevant facts to his attorney. The jury was instructed that, "Lack of intent may be proven by evidence showing that the Defendant did not report the income in question on advice of counsel, but this is not a defense unless you find that the Defendant made a full disclosure of all the facts to his attorney. . . ." This was a proper and also an agreed upon instruction.

The judgment is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO 10, ILLINOIS

Wednesday, September 12, 1962

BEFORE

Hon. F. RYAN DUFFY, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GEORGE E. BALDWIN, *Defendant-Appellant.* No. 13354	Appeal from the United States District Court for the Southern District of Illinois, Southern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

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No. 486

In the Supreme Court of the United States

October Term, 1942

Charles E. Haldeman-Julius, petitioner,

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FAHY,
Solicitor General,
WENDELL BERGE,
Assistant Attorney General,
ROBERT S. ERDAHL,
Special Assistant to the Attorney General,

Department of Justice,
Washington, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 499

GEORGE E. BALDWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 307 F. 2d 577.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A) was entered on July 26, 1962. A petition for rehearing was denied on September 12, 1962. (Pet. App. B.) The petition for a writ of certiorari was filed on October 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether there was sufficient evidence on which the jury could find beyond a reasonable doubt that peti-

tioner willfully attempted to evade his taxes by understating his taxable income in his 1953 and 1954 tax returns.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure To Collect and Pay Over Tax, Or Attempt To Defeat Or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was charged in two counts with the willfull attempt to evade his individual income taxes by the filing of false and fraudulent income tax returns for the calendar years 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. The reported and correct taxable income and tax liability, as alleged in the indictment, are as follows (R. 1–2):[1]

	Income		Tax	
	Reported	Correct	Reported	Correct
1953	$6,473.23	$28,748.71	$162.00	$8,239.38
1954	1,072.92	42,230.72	None	19,278.20

The evidence showed that petitioner, in his tax returns for 1953 and 1954, radically understated his gross income. Petitioner's business gross income as reported in each return was based almost entirely on deposits made by petitioner to his accounts in certain banks during the respective years. (R. 8, 973; Govt. Exs. 1, 2, 150–A, 151–A.)[2] Investigation revealed, however, that petitioner received a great many payments which he did not deposit in these banks, and which he disposed of in part to pay business expenses, and in part to pay personal bills, to remodel his home,

[1] "R." refers to petitioner's appendix in the court below; "Supp. R." will be used to refer to the Government's appendix in that court.

[2] Government Exhibits 1 and 2 are the respective tax returns; Government Exhibits 150–A and 151–A, charts of deposited and undeposited items, are reproduced at Supp. R. 35–37 and 39–41, respectively.

and to buy rental property. (R. 62, 154–159, 176–178, 179–180, 182–190, 191, 192, 562, 563, 728, 809, 829, 857, 863, 891; Govt. Exs. 55, 81, 123, 131.) He also placed substantial monies in a bank account in the name of his brother, Albert Baldwin, and with an agent, Gerald Rock. (R. 182–189, 831, 866, 891.)

In proving the understatement of taxable income and of the taxes owed, the Government accepted the statement of business expenses reported in petitioner's returns (R. 511–512), and in fact discovered additional expenses of $14,690.80 for 1954 which were credited to petitioner (R. 348). The Government, through documents and the testimony of about fifty witnesses (R. 18–274), proved specific payments to petitioner for interests in oil and manganese ventures he was promoting, in the total sum of $34,884.07 for 1953 (Supp. R. 37; Govt. Ex. 150–A), and $47,021 for 1954 (Supp. R. 41; Govt. Ex. 151–A), and showed that these items were not reflected in petitioner's bank accounts and were not included in his tax returns (R. 307–522). When these undeposited and unreflected items are added to the gross business income reported, and this gross income is reduced by both the reported expenses and the additional expenses found by the Government, the correct adjusted gross income for 1953 is found to be $32,997.13, and for 1954, $33,403.12. (R. 522). In contrast, petitioner's returns reported $3,473.23 of adjusted gross income for 1953, and $1,072.92 for 1954. (Govt. Exs. 1, 2.)

Petitioner's returns were prepared by an attorney who testified (R. 7–18, 949–993, 1048–1059) that he was, in a general way, well acquainted with petition-

er's transactions. The attorney's testimony and a comparison of the total bank deposits with the reported gross income show, however, that the attorney based the gross income figures in the tax returns almost exclusively on the deposits in petitioner's bank accounts. Moreover, the attorney's testimony indicated that he was by no means fully informed as to petitioner's receipt of the undeposited sums in issue and as to the uses made of them by petitioner (*ibid.*)

ARGUMENT

In his petition, as in his brief below, petitioner confines himself largely to an argument on the facts, urging factual conclusions which the jury was not bound to accept, and which it in fact must be assumed to have rejected.

Petitioner's principal contention here (Pet. 46), as in the Court of Appeals, is that he had no taxable income at all during 1953 and 1954, but rather a net loss. He asserts (Pet. 33) that the government adopted the "basic fallacy" of treating as income "every dollar that passed through Defendant's hands," and that the government "would have the court believe that Defendant never had any expenses in the conduct of his business." The record flatly refutes those contentions. The testimony of Special Agent Ronat (R. 307–322) shows that he made a meticulous analysis, sifting out any possible duplication of receipts, as in the transfer of funds from one bank to another, and adding to petitioner's gross income only those sums received by him but not deposited in his bank accounts, and thus not reflected on the tax returns. As to business expenses, the Government conceded *all*

such expenses claimed on the returns,[3] and an additional $14,690.80 for 1954. (R. 348). Petitioner introduced 1,092 exhibits in an effort to show that he in fact operated at a great loss. The jury was warranted in not accepting his proof of staggering losses, since, as the court below concluded (Pet. App. 4, 5), petitioner's claimed disbursements for both years not only included "duplication of expenses, personal expenditures, investments of capital, and other non-deductible items" (e.g., "the cost of his and his family's personal living expenses, the costs of remodeling his home, and the purchase of an apartment building"), but also failed to recognize the reimbursement of petitioner for "whatever amount he actually expended for the partnership from its working capital."

Petitioner also argues (Pet. 9–12, 42, 47) that the jury should have concluded that he made a full disclosure of his income to his attorney, and that he acted in good faith on the attorney's advice. The short answer, as the Court of Appeals observed, is that the evidence showed (Pet. App. 5–6) "that defendant did not fully disclose the relevant facts to his attorney," and that this was, in any event, "a matter for the jury to determine under proper instructions" which were in fact given.

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[3] Petitioner's 1953 return (Govt. Ex. 1) reported total business expenses of $58,055.42, including items for gasoline, attorneys' fees, commissions, recording fees, hotels, travel, telephone, heat and lights, well costs ($30,661.85), and leasing costs ($13,950). His 1954 return (Govt. Ex. 2) reported total business expenses of $24,470.42, including $12,439.01 for well drilling, $4,650 for "lease costs," and $2,265.26 for legal, recording and engineers' fees.

CONCLUSION

No significant question of law appears in this case, nor anything to indicate that petitioner did not receive a fair trial. Therefore, it is respectfully submitted that the petition should be denied.

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LOUIS F. OBERDORFER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 499

GEORGE E. BALDWIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR GEORGE E. BALDWIN, PETITIONER

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

We will answer separately the briefs filed by:

1. Honorable Archibald Cox,
   Solicitor General and his Associates
   Washington, D. C.
2. Hon. Edward R. Phelps,
   United States Attorney and his Associates
   Springfield, Illinois

QUESTIONS PRESENTED

The Government's brief on pages 1 and 2 improperly states *one question only* which question should have been stated as follows:

Whether there was clear and convincing evidence on which The Jury could find beyond a reasonable doubt that petitioner, GEORGE E. BALDWIN, received income for either 1953 *or* 1954 *which he deliberately and wilfully and with specific intent failed to include in his returns for either of said years and whether the Government proved said wilfullness by independent and additional evidence beyond the mere alleged understatement of his income.*

See cases cited under Subdivisions III, IV, V and VI on pages 12 to 18 and on pages 23 to 27 of the Baldwin Petition herein.

Particularly under the cases cited in article V of the Petition herein, the rule is definitely stated that:

> *"A final element necessary for conviction is wilfullness which involves a specific intent and which must be proved by independent evidence and which cannot be inferred by the mere understatement of income."*

On pages 2 and 3 of the Baldwin petition herein the several questions presented here are clearly stated. Same need not be repeated here.

Furthermore the Government called Petitioner Baldwin's attorney, Roger V. Pierson, as its own first witness. See the testimony of Pierson not only as a witness for the Government but also as a witness for Petitioner Baldwin. (See Petition pages 6 and 7 and testimony of attorney Pierson there referred to.)

From the testimony of the Government's own witness, Pierson, it is entirely clear that under the rules laid down in the cases cited under Sub. II on pages 9 and 12 of the Petition herein and the Government's own evidence that Petitioner Baldwin should have been found *not guilty* on both counts.

Answering the first paragraph of the Government's statement on page 3 we definitely state that the figures at the end of that paragraph for the *alleged* correct income and tax are definitely incorrect as will be later shown in this Petition.

There was no evidence on which the jury could have found beyond a reasonable doubt that petitioner wilfully attempted to evade his income taxes by understating his taxable income in 1953 *and* 1954 *tax returns.* (Answering Government Brief 1 and 2.)

Counsel for the Government entirely overlook the fact that in this *case it was its plain duty to prove beyond a reasonable doubt by clear and convincing evidence that Petitioner, George E. Baldwin, received income for either the year* 1953 *or that of* 1954 *which he deliberately and wilfully and with specific intent failed to include in his income tax report for either of said years.*

Furthermore the Government failed to prove said wilfullness and *specific intent on the part of George E. Baldwin by independent and additional evidence beyond the mere alleged understatement of his income.* (See page 3 of *Baldwin's* Petition here also pages 12 to 27 thereof.) In its opinion the Court of Appeals also entirely disregards its own opinions in the cases above cited, which cases were also cited by Petitioner Baldwin in that Court. Counsel for the Government are in error in stating (page 3) that Petitioner's *reported and correct taxable income are as*

there set forth. In so stating they disregard entirely Petitioner Baldwin's 1000 exhibits (App. Vol. IV, pp. 83-118). Expert Ronat for the Government did the same. On page 3, counsel also disregard the same 1000 exhibits offered by Petitioner Baldwin and admitted without objection by the Government. Counsel refer (page 3) to Government exhibits 1 and 2 (Baldwin Income Tax Reports) and Government Exhibits 150A and 151A (1953 and 1954 charts) prepared by Mr. Ronat with changes during the trial according to his own testimony. Those exhibits were inadmissible.

Counsel state on page 3 that Petitioner Baldwin *radically* understated his gross income for 1953 and 1954. (See page 46 of the Petition herein. See also 1000 Petitioner's Exhibits, Vol. IV, pp. 33-118.)

The "great many payments" mentioned by Counsel were received for interests in oil and gas leases sold by Petitioner Baldwin, according to the Government's own evidence (App. 18-91, 107-162, 181, 267-278) and cannot be considered income to Petitioner Baldwin without further proof as to the actual cost of said oil and gas interests to him. On page 4 the Government states that "Petitioner also placed substantial moneys in a bank account in the names of his brother Albert A. Baldwin and an agent Gerald Rock.

The Government itself called Albert A. Baldwin, Petitioner's brother, as its own witness (App. 182, 189, 190) and is bound by that witness' testimony. Albert Baldwin merely accommodated Petitioner by cashing checks for his brother George to enable Petitioner to obtain ready cash received by him (App. 182).

The Government entirely disregards throughout this case the fact that Petitioner's other brother, Charles Bald-

win, used $7,500.00 in his hands belonging to Petitioner in payment of the latter's indebtedness in a Jackman deal (App. 197).

On page 4 the Government concedes that "*through documents and the testimony of about fifty of its own witnesses* (App. 18-274) *it proved specific payments to petitioner for INTERESTS IN OIL AND MANGANESE VENTURES* (*Arizona Material Service Co.* $20.000.79, *and Danitz* $3,000.00) *which Petitioner was promoting, in the total sum of* $34,884.07 *for* 1953 *and* $47,021.40 *for* 1954 (Supp. R. 41, Gov. Exhibit 151 A) *and showed that these items were not included in Petitioner's bank accounts and were not included in his tax returns* (App. 307-522).

The Government must admit by the testimony of its own fifty witnesses that the sums of money paid to Petitioner by those fifty Government witnesses constituted capital investments by them for Petitioner's interest in those leases and should not and could not be charged against Petitioner as income without at least offering some proof of the cost to Baldwin of those various interests so sold. We are warranted in assuming that Petitioner Baldwin possibly sustained an actual loss on all of the oil interests so sold by him to the Government's 50 witnesses.

Again we call this Court's attention to the Government's admission that some of those fifty Government witnesses testified to payments for *Manganese Ventures*. Again we respectfully call this Court's attention to the cases cited by Petitioner under Sub. VII on pages 18-27 of his Petition herein. It is elementary that investments in a partnership (Arizona Material Service Co. and Danitz) cannot under any circumstances be considered income to a partner until a complete accounting as to the partnership itself.

On page 4 counsel state "When these undeposited and unreflected items are added to the gross business income reported, and this gross income is reduced by both the reported expenses and the additional expenses found by the Government the correct adjusted gross income in 1953 is found to be $32,997.13 and for 1954 $33,403.12." The Government alleges again on page 4 that the adjusted gross income for 1953 is found to be $32,997.13 and for 1954 $33,403.12 as compared with the previously reported gross income of $3473.23 for 1953 (on which a tax of $162.00 was paid in 1953). Reference is made to Government Exhibits 150A and 151A.

Counsel state near the foot of page 4 that $33,403.12 is the income unreported by Petitioner Baldwin for the year 1954. They overlook the fact that $20,600.79 of that amount is charged by the Government for collections made in *Arizona Material Service Company* case and $3,000.00 is charged for the Danitz partnership (see Baldwin Petition p. 43).

At the foot of page 4 and top of page 5—counsel state that Baldwin's returns were made by *an attorney*. They do not say that that attorney was Roger V. Pierson, *the Government's own first witness*. (App. 7-18, Petition pp. 6-7, 31, App. 949). Even though attorney might be wrong Baldwin depended on his advice.

At the top of page 5 Counsel state that attorney Pierson's testimony and a comparison of the total bank deposits with the reported gross income show that the attorney (Government's own witness) based the gross income figures in the tax returns almost exclusively on the deposits in Petitioner's bank accounts and that the attorney's (Government witness) testimony indicated that he was by no means fully informed as to Petitioner's re-

ceipt of the undisputed sums in issue and as to the uses made of them by Petitioner.

Again we respectfully call this Court's attention to the fact that those very bank accounts *so introduced by the Government* show disbursements practically exhausting said deposits. (See last long paragraph on page 5 of Baldwin Petition.) This fact has been entirely disregarded by the Government in all Courts. We repeat that the Government introduced as its own evidence those reports as its Exhibits 1-2, and that the bank statements (Government Exhibits 3-11) show a net income of $435.48 for 1953 and $271.32 for 1954. (Baldwin Petition page 5). *At this point the Government definitely proved Baldwin not guilty.*

Furthermore Counsel for the Government fail to even mention throughout this case the undisputed testimony of Petitioner Baldwin, himself, *that he had no intention of concealing anything from the Government or any one else* (Petition page 45). Both Petitioner and Attorney Pierson courteously handed all of Baldwin's books and records to the Government Expert, Arthur A. Ronat, who testified that he had exclusive possession of same from August 1957 until April 1959 (App. 376). At this point then, Petitioner Baldwin had no intention of concealing anything, according to the Government's own evidence.

On page 4 counsel state "The government, through documents and about fifty witnesses (R. 18-274), proved specific payments to Petitioner for interests in oil and manganese ventures he was promoting, in the total sum of $34,884.07 for 1953 (Supp. R. 37; Gov. Ex. 150A) and $47,021.00 for 1954 (Supp. R. 41; Gov. Ex. 151A) and showed that these items were not reflected in petitioner's bank accounts and were not included in his tax returns (R. 307-522).

Counsel then state that the Government finds that the correct adjusted income for 1953 is $32,997.13 and for 1954 $33,403.12 (R. 522). They then agree that a gross income of $3473.23 was reported for 1953 but do not state that a tax of $162.00 was actually paid thereon. They also state that $1072.92 was reported for 1954. (Gov. Exs. 1 and 2).

Counsel also overlook on page 5 the fact that throughout this entire case no one representing the Government has ever denied Petitioner's definite and direct testimony that he never intended to conceal anything from the Government, from his attorney Pierson or anyone else (Petition 7).

In answer to Counsels' statement at the top of page 5 that attorney Pierson's testimony indicated that he "was by no means fully informed as to Petitioner's receipt of the undeposited sums in issue and as to the uses made of them by Petitioner (*ibid*)," we respectfully refer to pages 6 and 7 of the Petition herein and to the complete testimony of attorney Pierson. (App. 7-17, 949-964, 1048 to 1058). Answering Counsel's argument on page 5 we respectfully state again that the jury could not have neglected to find that:

1. Petitioner Baldwin had no intention of defrauding the Government for the reason that he so stated. (Petition 7). The government does not deny it.

Mr. Ronat, the Government's expert witness never used the word "fraud" but once and then with reference to something entirely irrelevant here.

2. The Government's entire evidence dealt solely with the question of whether Petitioner had more income for the years 1953 and 1954 than he actually reported in his income tax reports.

The Government's own witness, Attorney Pierson, definitely testified that Petitioner Baldwin reported all income to him at the time of the preparation and filing of Petitioner's income tax reports and that Petitioner relied upon and reported according to the advice of his attorney, Pierson, the Government's own witness. The jury had no other evidence on which to find Petitioner guilty.

The jury was bound to find Petitioner not guilty because his own attorney, Pierson, advised him what to include and not to include in his income tax reports and that Petitioner relied upon his attorney's advice.

The jury were bound to find Petitioner not guilty because the Government introduced no evidence whatsoever proving beyond a reasonable doubt by clear and convincing evidence that Petitioner received income for either 1953 or 1954 which *he deliberately and wilfully and with specific intent failed to include in his returns for either of said years.* Petitioner did just as he was advised by his attorney to do.

The jury did not have a word of evidence upon which it could find that Petitioner exercised such wilfullness, *which was necessary to be proven* by *independent and additional evidence* beyond the mere alleged understatement of his income. Admitting then, for the purpose of argument that Petitioner did receive more income for either of the years 1953 and 1954 than he reported in his returns, the Government's case must be dismissed because it did not even offer any additional evidence *beyond the mere alleged understatement of income,* if that.

Counsel must admit that the Government failed to introduce a word of evidence other than the mere alleged understatement of income. We respectfully state that

we have shown without doubt that Petitioner *had no income for either* 1953 *or* 1954 *beyond that which he* reported under advice of his attorney Pierson, the Government's own first witness.

We admit that Special Agent Ronat made a meticulous analysis sifting *everything which he wished to sift,* to support the Government, during almost two years when he had the exclusive possession of all of Petitioner's papers. Counsel overlooked the undisputed fact that Petioner's Bank statements introduced without restrictions as to deductions, show without question, a profit of $435.48 for the year 1953 and $271.32 for the year 1954. We concede that although Attorney Pierson took no credit for the disbursements shown in the bank statements, the Government's evidence in this case actually shows the above annual balances. Special Agent Ronat and his Counsel are bound by their own record. It is also entirely clear from the record that Ronat disregarded all of the 1000 exhibits admitted in evidence on behalf of Petitioner. (App. Vol. IV, pp. 33-118).

We acknowledge the courtesy of counsel in stating several times during this proceeding that they agreed that Petitioner should have a credit of $14,690.80 for 1954.

Those of the 1092 exhibits admitted in evidence without objections or over objections on behalf of the parties at the trial, together with other undisputed evidence prove beyond question that Petitioner had less net income for the years 1953 and 1954 than was reported. Especially is this true when we consider the net amounts shown on the bank statements. (Gov. Exs. 3A-5).

Near the top of page 6 Counsel state that "the jury was warranted in not accepting his proof of staggering

losses" and refer to (Pet. App. 4, 5). We find no such statement there referred to.

We do not understand counsel's unusual statement on page 6 following the above. This Court could not and would certainly not decide this case either partially, or wholly upon that statement. A partnership has absolutely no part in the issues in this case. (Petition, p. 18, Sub. VII).

We respectfully state that the jury was obliged to find Petitioner not guilty on the Government's own evidence by attorney Pierson (Petition 6, App. 7-18) that Petitioner's income tax reports for the two years in question were correct and that Petitioner relied solely upon attorney Pierson's advice. (The Government's own first witness). We do not understand counsel's reference to "Petition, App. 5-6."

We respectfully submit that the jury were not entitled to find adversely to Petitioner where there was absolutely no evidence to support such a finding.

It is indeed unusual for a party to litigation to prove the opposing party not guilty by its own witness and then claim that very party is guilty.

On page 7 Counsel conclude with the statement that "No significant question of law appears in this case, nor anything to indicate that petitioner did not receive a fair trial," and that therefore the Baldwin Petition should be denied.

In reply thereto we respectfully state that the Government *proved by its own first witness,* Attorney Roger V. Pierson, (1) that he represented George E. Baldwin in the preparation of his 1953 and 1954 income tax reports, (2) that he discussed with Baldwin whether or not there

might exist income to Baldwin during the years 1953 and 1954 which was not deposited in the banks, (3) that Petitioner Baldwin relied entirely on his services and advice; and (4) that Baldwin's income tax reports for the 2 years in question were correct in his opinion (App. 7-8).

We repeat that *this was the Government's own witness testifying.*

The Government did not see fit to introduce any evidence whatsoever other than to allege and claim that Petitioner Baldwin had more income for the years 1953 and 1954 than he had reported. In other words the Government offered no independent evidence other than the *alleged understatement of income* to prove beyond a reasonable doubt that Petitioner Baldwin deliberately failed to include any income in his returns.

Furthermore the Government proved by *its own first witness,* Roger V. Pierson, that Petitioner Baldwin acted upon the advice of said Roger V. Pierson after a full disclosure of the facts. As a matter of fact we fail to find the slightest word in the testimony of the Government's witness Arthur A. Ronat *other than the mere receipt of alleged additional income,* to support the Government's claim of wilfullness.

From all of the decisions cited in the Baldwin petition herein, also cited in the trial Court as well as in the Court of Appeals, and entirely disregarded by both Courts, *a final element necessary for conviction is wilfulness which involves a specific intent and which must be proved by independent evidence and which can not be inferred by the MERE UNDERSTATEMENT OF INCOME,* (See Baldwin petition pages 9-26).

It is entirely clear from the Government's own evidence in this case that Petitioner George E. Baldwin, the taxpayer here, acted in good faith upon the advice of his attorney Roger V. Pierson (the first witness called by the Government) after a full disclosure of the facts to such attorney. (2) The Government entirely failed to prove beyond a reasonable doubt that Petitioner Baldwin *wilfully and deliberately failed to include any income in his returns.*

That burden rests upon the Government from the beginning to the end of the trial. The final element necessary for conviction is wilfulness which involves a specific intent *and which must be proved by independent evidence and which cannot be inferred by the mere understatement of income.* Fraud is never presumed but must be established by clear and convincing evidence. (See Baldwin Petition herein pages 9-27). We repeat that Counsel here as well as in the Court of Appeals did not see fit to *even mention the cases cited* on the above pages of this petition.

We therefore respectfully suggest to this Honorable Court that Petitioner Baldwin's petition be allowed, and that a writ of certiorari be issued. *We will now answer the copy of the Government's brief filed in the Court of Appeals in answer to our original brief filed there.*

Hon. Edward R. Phelps, United States Attorney and his associates at Springfield, Illinois, in answer to Petitioner George E. Baldwin's Petition for a writ of certiorari in this Court, have filed copies here of their brief formerly filed in the Court of Appeals.

It will be necessary also to answer that brief here. On page 2 of their brief the Government Counsel in the trial Court and the Court of Appeals agree that Roger V.

Pierson, the first Government witness, was the attorney for Petitioner Baldwin in the preparation of his 1953 and 1954 Income Tax Reports. They admit the delivery by both Petitioner and said attorney Pierson to Government Agent Ronat of all of the George E. Baldwin income tax books, papers and records for the years 1953 and 1954. They also admit that Mr. Ronat had possession of those Records for nearly two years before the indictment. On pages 3 of that brief an alleged resume of Petitioner Baldwin's Income Tax Reports is given.

On page 4 of their brief, Counsel admit that during the year 1953 and the first half of 1954 George E. Baldwin (Defendant in the trial court, Appellant in the Court of Appeals and Petitioner here), was engaged in the sale of oil leases and interests therein. Counsel also admit that during the latter part of 1954 Petitioner was engaged in promoting the operation of a mining claim in Arizona, under the name of Arizona Material Service Company, a limited partnership in which Government Witness Craig and Petitioner were limited partners (App. 207). See also the item of $3,000 invested by Petitioner in the Danitz partnership (Petition 20, 21, 23).

Counsel also state that some 50 witnesses testified for the Government with reference to the payment by them to Petitioner here of various sums for interests in said oil leases (App. 18-174). Counsel state that the Arizona Material Service Company, a limited partnership, ceased operations in September for lack of funds.

Here, then, the Government agrees that the Arizona Material Service Company was a limited partnership and that Government witness Craig, and Petitioner Baldwin were limited partners. The Government agrees that there never was a partnership accounting with reference to said

Arizona Material Service Company. According to the decisions in the cases cited under Sub. VII on pages 18-24 of the Petition herein all questions with reference to that Company absolutely and entirely cease to be any part whatsoever of the issues in this case and particularly as to Petitioner Baldwin's liability to the Government on any question there. See also the question as to Petitioner Baldwin's liability in the Danitz Partnership (Petition, 20, 21, 23, 43).

Sections I to V on page 6 of the Government's brief will be answered in their order.

In answer to the statement under "Introduction" on page 8 Petitioner definitely claims that the evidence does not support the Verdict in this Case even viewing the record in the light most favorable to the Government.

In answer to the cases cited by Counsel on pages 7 and 8 we respectfully state they have no bearing on the issues here. There is no such case as the *Lynch* case reported as cited. The cases generally hold that where there is a sufficient evidentiary foundation to support the verdict a court of appeals must view the record in the light most favorable to the Government.

We respectfully suggest that there was no evidence to support the Government in questions 1 to 8 on Pages 2 and 3 of the Petition herein. See the cases cited under Subs. I to VII of the Petition herein.

In the case of *United States* v. *Phillips*, 217 F. 2d 435 cited by the Government at the top of page 9 and also cited by Petitioner here on pages 13 and 27 of the Petition the court's decision there was in favor of Petitioner here.

Answering item I under Sub. I on page 9 this Court's attention is called to the fact that counsel have merely referred to a number of portions of the record but have not stated how the same would apply here. Counsel state that said exhibits represent cash received for oil interests and mineral lands. Without some proof on the part of the Government as to the value of those oil interests sold or the cost of same to Petitioner Baldwin it is impossible to charge the amounts received for said oil interests as income to Petitioner. Petitioner has raised this question repeatedly without any answer by counsel for the Government. There might have been a loss to Petitioner in all or some of the oil transactions. *Furthermore we repeat that under* 26 U.S. Code 613 *Petitioner Baldwin is entitled to a 27½ percent depletion allowance on any profit which he would have made on any of the sales* of oil interests before being charged with any income tax under any circumstances. At the foot of page 9 Counsel refer to certain volumes and pages as proof of income to Petitioner Baldwin. Those references are to checks made by certain investors in oil leases or in interests in Arizona Material Service Company, a limited partnership or in the Danitz partnership. See Government Exs. 6A, 94, 17, 33, 57, 59, 65, 67, 68, 69, 71, 88, 89, and 95. See App. pp. 280, 281, 283, 288, 292, 302 and 303. None of these investments can be chargeable as income to Petitioner Baldwin. This is all the Government's own evidence. The same applies to the references at the top of page 10.

There is absolutely no basis for the statement that the account with Gerald Rock and brother Albert Baldwin were secret deposits. Albert Baldwin was a witness called by the Government. A casual reading of his testimony will show the reason for the account with Albert Baldwin, namely for convenience in cashing checks received by Peti-

tioner Baldwin. The same applies to the Gerald Rock account.

Incidentally the Government subpoenaed Gerald Rock as its own witness, kept him waiting to be called for two weeks and 3 days and then did not call him (App. 401). Counsel refer to the conflicting testimony of the Government's own witness, Jameson as to a refund. It is not clear as to what evidence was conflicting in the mind of Counsel for the Government.

We respectfully suggest to this Court that the claims set forth in Par. 4 on page 10 have no bearing here. The Government there admits that the checks in question were received for investments in oil leases. The same applies to the allegations set forth in Par. 5. Petitioner Baldwin testified in answer to Counsels' questions that he paid for trucks through oil properties. "It was an even trade for oil leases." The Government offered no proof to the contrary.

We do not understand what counsel mean by Pars. 6 and 7 on page 10. Net income would be what would be subject to tax against Petitioner Baldwin, defendant in the trial court.

The statement in the last paragraph on page 10 and the top of page 11 has no bearing here. We understand that Counsel's statement on page 11 re undeposited receipts for 1953 reduced by adjustments to $29,523.90 on which there is a tax due of $10,358.48 is the Government's final claim. The Government does not give Petitioner any credit there for the agreed taxable income of $3,473.23 on which a tax of $162.00 was paid.

On page 11 we understand that C P A Ronat's figures taken from his chart (Ex. 151 A), prepared by him during the trial differed from his figures prepared during the

nearly two years while he had the exclusive possession of all of Petitioner Baldwin's records and papers (App. 376). We assumed also that $47,021.00 is the Government's final figure for alleged undisclosed income from which additional expenses were deducted in the sum of $14,690.80, leaving the final sum of $32,830.20 and that *after adding* $1,072.00 *already reported* (which $1,072.00 should have been deducted rather than added) that the alleged final unreported figure will be $33,403.12. At the foot of page 11 counsel state under Sub. II that Defendant's tax returns for 1953 and 1954 were false with respect to his true adjusted gross income. Nowhere does the Government allege or claim that it even tried to prove wilfulness or specific intent on the part of Petitioner by any evidence other than mere understatement of income. (See Petition p. 15, Sub. V and the cases cited thereunder).

We refer particularly to the many decisions of this Court cited in the *Dearing* case (Petition 16) as well as the decisions of this Court cited in the *Small, Sr.* case (Petition 17). We repeat that the Government expert Ronat never intimated fraud on Petitioner's part. He limited his testimony to the statement of facts and figures only. It is difficult indeed to be helpful to this court in answering Counsel's reply to our brief in the Court of Appeals without furnishing this Court with a copy of our brief in the Court of Appeals. However we will say that we have not intentionally made any unfair statements there or here.

On page 13 of the Government's brief in the Court of Appeals it definitely states that "Defendant's business was the sale of leasehold interests in oil and mineral land and in promoting the recovery of oil by a process which had been developed in Illinois, the Defendant assuming the obligation of developing the production of oil from the old

wells in some instances." On page 13 the Government states that the Government accountant (Ronat) did not estimate the total of receipts but on the contrary testified in his opinion that Petitioner Baldwin did not deposit in his bank account net receipts of $34,884.07, which is not identical with the undisclosed income charged against defendant, Baldwin in that other adjustments reduced this amount in favor of the taxpayer to the sum of $29,528.90. We assume now that the *final definite amount* upon which the Government is here seeking to assess a tax against Petitioner Baldwin is $29,528.90 and not $34,884.07 mentioned by Mr. Ronat many times. And still in the very next page on page 13 of their brief Counsel state "As to Paragraph 3 on said page the Government accountant witness did not estimate the total receipts, but on the contrary testified in his opinion defendant (Baldwin) did not deposit in his bank account net receipts of $34,884.07 which is not identical with the undisclosed income charged against defendant (Baldwin) in that other adjustments reduce this amount in favor of taxpayer to the sum of $29,523.90. We respectfully state that the copy of defendant's (Baldwin) set forth on page 14 is correct according to the Government's own figures. It necessarily follows that the Government's statement on the same page is incorrect. On page 15 Counsel agree that even their countering table on page 14 does not reflect the adjusted income since adjustments were made with respect to the total undeposited item $34,884.07 in favor of the taxpayer in order to arrive at the actual unreported receipts in the year. Ronat says (App. 330), that the full unreported income for 1953 is $36,744.07. Then he says there was a deduction of $1,860.00, making a net total of $34,884.07. Ronat then mentions Attorney Pierson's finding of $58,880.38 with 2 adjustments to arrive at a total of $62,528.65. Ronat then men-

tions the figure of $61,528.65 as the total receipts. Again he states that the tax returns for 1953 show a correct business income of $53,519.86 appearing in the bank statement. On App. 331, Ronat says that his chart shows $34,884.07 with a deduction of $5,360.17 leaving *$29,523.90 which Ronat again says is the net unreported income.* He states that the adjusted gross income on the return was $3,473.20 on which a tax of $162.00 was paid (Ex. 1). On App. 332 Ronat tells that he arrives at the proper amount on which the tax should be based by adding $2,473.28. (The correct figure is $3,473.28, the amount on which tax was paid) to $29,523.90, "that I decided earlier to arrive at the corrected figure of $32,997.13, (App. 332). Evidently Ronat does not recognize that he is using $2,473.28 as the amount of income already reported rather than $3,473.28, the correct figure. Ronat then describes his charts. It is evident from the last figures that they do not agree with the Charts.

In spite of Ronat's figure of $29,523.90 as the final amount of *unreported income for* 1953, he again arrives at a figure of $32,997.13, that he adds $2,473.28, (should be $3,473.28) the amount already reported in Government Ex. I. The figure of $2,473.28 (actually $3,473.28 paid) cannot under any theory be considered unreported income on which Ronat was seeking to impose an additional liability for unpaid taxes for 1953.

On page 15 Counsel claim the unreported income to be $34,884.07. At any rate we will try to show this Court the final correct figures as to the unreported income taxes due for 1953, if any. From the above it is clear the Government figures "is based upon Ronat's own opinion."

We again call Counsel's attention to Sub. III, pages 12-17, of the Baldwin petition herein. There is not a word in the record even tending to prove Petitioner guilty

of tax evasion under the rules there laid down. This applies especially to the rule announced in the cases cited under Sub. V on page 15 of the petition herein.

It is entirely clear from a careful reading of the Government's brief and the record in this case that *the Government has entirely failed to prove beyond a reasonable doubt by clear and convincing evidence that Petitioner Baldwin deliberately and wilfully and with specific intent sought to evade any income tax for either of said years. It is just as clear that the Government has failed to offer any independent evidence whatsoever, outside of the alleged proof of unpaid income, to support the element of wilfullness. In other words proof of unreported income, if it is income, without independent and separate evidence of wilfullness is not sufficient evidence upon which to base the Government's attempt to send a taxpayer to prison, no matter how much income that taxpayer may* (See Sub. V, page 15 of Petition here) actually owe. Under the evidence in this case Petitioner Baldwin owes no tax.

It is natural that Counsel would and *must* rely upon the testimony of CPA Ronat. Mr. Ronat has shown in this record in many instances, various reasons for which his testimony can not be finally relied upon.

C.P.A. Ronat at one point estimates that Petitioner's unpaid income taxes for 1953 would be based upon $25,917.69 (App. 346). At another point he says he arrived at a figure of $47,021.00 from which $14,690.80 should be deducted leaving $32,330.20 (App. 348). At App. 332 he corrected the adjusted gross figure by adding the adjusted gross income as reported in Petitioner's 1953 Income Tax Report as $2,473.23 (he should have said $3,473.23) (See Gov. Ex. 1) added to $29,523.90 to make the corrected figure $32,997.13. At App. 331 Mr. Ronat says the net figure is $29,523.90.

At App. 330 Mr. Ronat states that the full total of the unreported items for 1953 is $36,744.07 from which should be deducted $1,860.00 (total of non-currency deposits) leaving a final figure of $34,884.07. See also App. 329.

At App. 313 Mr. Ronat stated that as a part of his investigation and as an expert he made determination as to whether in his opinion *"that was or was not income"*. Mr. Ronat went on to state his system of analysis (App. 313). He stated that the charts were prepared by him. He then stated the manner of such preparation (App. 315, 316).

He testified that Government's Ex. 1 for 1953 showed the total receipts of business and profit of $61,528.65. He stated that Mr. Pierson used total bank deposits of $58,880.03 in his work sheet to which he later added other items.

Mr. Ronat stated that in Government's Ex. 2 the business receipts were shown on the return for 1954 as $29,519.65 as computed by Mr. Pierson and that the actual deposits used were $5,307.69 for 1954 and that as a result of this analysis the deposits in the bank traceable to business receipts would be $47,792.77 a difference of $2,482.00. This is unbelievable.

Under Sub. III on page 12 counsel for the Government are in error in claiming that we stated herein that Petitioner Baldwin's disbursements for the years 1953 and 1954 exceed gross receipts in excess of $74,000.00 and $60,000.00 respectively. Neither were those figures set forth at the trial.

The Government's witness, H. O. Burckhalter (App. 275), testified that during 1953 Petitioner had paid Burckhalter's company Texhio, $3,661.73 for drilling operations.

The Government's witness, Arthur Leisy (App. 33, 53), testified that he paid Petitioner the sum of $10,000.00 for drilling operations during 1953.

The Government's Witness, H. G. Pruett (App. 130-139) testified that Defendant had paid him $24,000.00 for drilling operations during 1953. The Government's witness, Helen Watts (App. 177), testified that Defendant had paid her during 1953 the sum of $10,500.00 for remodeling.

The question in this case, as we understand Counsel's claim is, whether Petitioner Baldwin criminally evaded reporting an income of $34,884.07 reduced to $29,523.90 on which the true tax, according to Counsel, would be $10,358.48 for 1953 or whether Expert Ronat would concede that the taxpayer would be entitled to credit for what he actually paid on an admitted adjusted gross income of $3473.23. Under Sub. II at foot of page 11 Counsel clearly claim that Petitioner Baldwin's return for 1953 and 1954 were false. We respectfully and definitely deny that contention. We have carefully read the pages cited by counsel. We respectfully state that no such admissions were made by Petitioner Baldwin.

Counsel admit in paragraph 5 on page 16 that Petitioner here paid $10,000.00 to Leisy in 1954. Under paragraph 6 on page 16 Counsel admit the expenditure of all of the items there mentioned. Counsel ended that paragraph with the statement that Government witness Pruett's testimony proved business expenses. Counsel's paragraph 7 at the foot of page 16 and the top of page 17 is conceded.

On page 23 under Sub. IV of the Government's brief counsel contend that the question of Petitioner having acted under the advice of counsel was a question for the jury. We respectfully state that the Government offered no evidence whatsoever on that question. Furthermore attorney Pierson, the Government's first witness, definitely testified that Petitioner acted on his attorney's advice (Petition page 6).

The testimony of the Government's witness Pierson, quoted by counsel on page 24 proves conclusively that Petitioner had the absolute right to, and did, depend upon the advice of his attorney Pierson. We agree that the cost of the two parcels of real estate purchased by Petitioner cannot be charged against his income. We do, however, claim that he can deduct from his income the cost of any repairs or reasonable improvements.

At the close of the Government's brief on page 31 counsel claims that "*defendant's* (Petitioner) *failure to supply his attorney* (Pierson; the Government's first witness) *with a complete record of his total receipts, coupled with all the other circumstances in this case,* (such circumstances are not mentioned) *disclose overwhelmingly his own personal knowledge, specific intent, evil motive, and wilfulness to which he could not close his eyes.*"

We respectfully state that the record is clear that the Government has proven nothing more than a possible difference in actual net income for the two years.

Under the cases cited on pages 12 to 18 of the Petition here such proof fails to convict Petitioner for the reason that *the Government utterly failed to prove Petitioner's alleged wilfullness by some independent evidence beyond the proof of the mere understatement of income.*

Furthermore the Government has offered no evidence whatsoever to deny the positive statement of both attorney Pierson (the Government's own first witness) and Petitioner that he, in good faith, made full disclosure to his attorney Pierson who advised Petitioner that his income tax reports for the years 1953 and 1954 were correct. (See Petition pages 6 and 7).

The evidence in this case proves conclusively that Petitioner received no income for either 1953 or 1954 beyond that reported. In fact Petitioner did not receive as much net income for either of said years as was actually reported.

Petitioner disclosed to his attorney (the Government's first witness) all of the facts with reference to his income for each of said years 1953 and 1954. Petitioner relied upon and acted upon the advice of his said attorney.

The Government did not see fit to deny Petitioner's specific statement that he never intended to conceal anything from the Government, Mr. Pierson his attorney, or anyone else (App. 708-709).

The record in this case conclusively proves that even the 57 witnesses called by the Government to testify against Petitioner at the trial testified to payments by them to Petitioner for the assignment by him to them of interests in oil and gas leases. The Government did not offer any evidence in this criminal case as to whether Petitioner received enough from such assignments to give him any profit after the deduction of the usual 27½ percent depletion allowance from such net income, if any.

Under the evidence offered by the Government there was no income to Petitioner on which any tax could be imposed upon him.

Petitioner's courtesy together with those of his attorney Pierson (the Government's first witness), in handing over to Government agent Ronat all of the books, documents and papers in their possession, all of which Mr. Ronat kept for nearly two years, surely would not induce any reasonable person to believe that Petitioner was guilty of the specific intent, evil motive and wilfullness charged by the Government against petitioner. Actually the Government did nothing more than try to prove that Petitioner merely *received more* income than he reported. The word "fraud" is nowhere used in Mr. Ronat's entire testimony.

For the reasons herein stated Petitioner should have been found not guilty.

Counsel concede on page 26 that the law is "that partnership income is not as such taxable under the income tax laws."

That eliminates the alleged income to Petitioner from the two partnerships known as Arizona Material Service Co. and Gdnaitz (Danitz).

Under the evidence in this case and the decisions of the Courts herein cited, Petitioner Baldwin should have been declared not guilty by the trial Court and the Court of Appeals.

Finally it is entirely certain from the record in this case that the Government proved beyond a reasonable doubt the following:

1. That after the deductions set forth in said bank statements there was anything more than a profit of $435.48 for 1953 and a profit of $271.32 for 1954. The Government offered no proof as to the deductions mentioned in said bank statements.

2. That Petitioner Baldwin had no net income subject to tax for either of said years 1953 or 1954 beyond that actually reported and paid.

3. That there was no excess of income over expenses for either year.

4. That the Government offered no proof whatsoever of Petitioner's wilfullness involving a specific intent by independent evidence other than mere understatement of income.

5. That the Government, by its own first witness, Roger V. Pierson (Petitioner's attorney) proved that said attorney Pierson prepared Petitioner's income tax returns for 1953 and 1954 after full disclosure of the facts by Petitioner to his said attorney in good faith.

6. That Petitioner relied upon and acted upon the advice of his attorney, Roger V. Pierson in the preparation of said income tax returns for the years 1953 and 1954.

7. That the Government had no right whatsoever to charge Petitioner, as income, with any receipts by him in and about the two partnerships, Arizona Material Service Co. and Gdanitz (Danitz).

We therefore respectfully petition this Honorable Court to grant the relief requested in Petitioner's Petition and in his answer to the two briefs filed by the Government herein.

Respectfully submitted,

GEORGE E. BALDWIN
Petitioner

By HARRY C. KINNE
His Attorney

Counsel wishes to thank the Court and Counsel for their courtesy to me.

Harry C. Kinne